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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 371

UNITED STATES NATIONAL BANK IN JOHNSTOWN AND FIRST NATIONAL BANK OF SOUTH FORK, PETITIONERS,

vs.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND LESTER LARIMER, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 7, 1946.

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[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT**

APPENDIX TO APPELLANT'S BRIEF—Filed October 19, 1945

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the matter of HARVEY C. STINEMAN, Bankrupt.

No. 12786 in Bankruptcy

PERTINENT DOCKET ENTRIES

June 10, 1926 Debtor's Petition and Schedules filed.
June 10, 1926 Said debtor Adjudged Bankrupt.
June 10, 1926 Order of Reference issued.
July 31, 1943 Certificate Re: Petition of Chase National Bank relative to claim of the First National Bank of South Fork filed, together with Certificate Re: Petition of Chase National Bank and U. S. National Bank of Johnstown for Review of Order; Petition of Chase National Bank; Answer to Petition of Chase National Bank; Petition to Review Referee's Order; Petition of U. S. National Bank of Johnstown for Review; Opinion of Referee in Re: Status of Liens of U. S. National Bank of Johnstown and First National Bank of South Fork; Exhibits.

April 25, 1944 Hearing on Petition for Certificate of Review begun before Judge Gibson. Hearing Memo filed.

Aug. 3, 1944 Opinion filed by Judge Gibson Re: [fol. 2] Referee's Certificate of Review, relative to claims of First National Bank of South Fork, et al.

Aug. 24, 1944 On petition order made directing that Petition for Re-argument be granted and that the order of Aug. 3, 1944, be suspended pending further hearing Re: Claims of U. S. National Bank of Johnstown and First National Bank of South Fork, Pa. Same referred to C. R. Myers, Referee, to act as Special Master.

Nov. 27, 1944 Report of Special Master Re: Claims U. S. National Bank of Johnstown, Pa. and First National Bank of South Fork, Pa. received and filed, together with Transcript of Testimony.

June 20, 1945 Opinion filed by Judge Gibson. Order entered directing that the order of August 3, 1944 be vacated and set aside and that the order of the Referee of June 7, 1943 be sustained and that the exceptions thereto by the Chase National Bank of City of New York, be dismissed.

July 18, 1945 Notice of Appeal filed by the Chase National Bank of New York.

July 30, 1945 Copy of Notice of Appeal mailed to Circuit Court of Appeals.

July 30, 1945 Copy of Notice of Appeal mailed to Harry Doerr and Roman Widmann, attorneys for U. S. National Bank at Johnstown and to Meade Stineman, Attorney for First National Bank of South Fork, Pa., Appellees.

[fol. 3] Aug. 8, 1945 Stipulation and Designation of Record on Appeal filed.

Aug. 8, 1945 Proof of Notice of Designation of Record on Appeal filed.

Aug. 8, 1945 Stipulation of Counsel that Clerk need not proof-read the Record on Appeal filed.

In United States District Court

Notice of Appeal by Chase National Bank— Filed July 18, 1945

Notice is hereby given that The Chase National Bank of the City of New York, a creditor in the above entitled proceeding, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the order of this Court, made and entered herein on the 20th day of June, 1945, vacating and setting aside the orders of this Court of August 3, 1944, which adjudged and decreed that the United States National Bank of Johnstown and the First National Bank of South Fork, having accepted dividends from the general estate of the bankrupt upon the full amounts of their claims without having their secured claims valued, waived their secured claims as such and elected to claim as general creditors, and said, The Chase National Bank of the City of New York, appeals from each

and every part of said order as well as from the whole thereof.

Dated: New York, N. Y., July 17th, 1945.

Yours, etc., MILBANK, TWEED & HOPE, 15 Broad Street, New York, N. Y. Attorneys for The Chase National Bank of the City of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING REFEREE'S ORDER—June 20, 1945

And now, to wit, June 20, 1945, after due hearing pursuant to motion of the United States National Bank in Johnstown for a re-hearing sur order of this court of August 3, 1944, upon consideration thereof it is ordered, adjudged and decreed that said order of August 3, 1944, be, and hereby is, vacated and set aside; and it is further ordered, adjudged and decreed that the order of the Referee of June 7, 1943, be, and hereby is, sustained, and that the exceptions thereto by the Chase National Bank of the City of New York be, and hereby are, dismissed.

(Signed) R. M. GIBSON, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—October 9, 1942

Sirs:

Please take notice upon the annexed petition of The Chase National Bank of the City of New York, verified the 9th day of October, 1942, a motion will be made before the Hon. C. R. Myers, Referee in Bankruptcy herein, at 10 a.m. on the 13th day of November, 1942, at his office at 213 South Center Street, Ebensburg, Pa., or as soon thereafter as counsel can be heard for an order

(a) adjudging and decreeing that said United States National Bank of Johnstown waived any lien it may have had by virtue of a judgment entered against the bankrupt herein at the June 1925 Term of The Court of Common Pleas, Cambria County, Pa., that it waived

any security interest represented by said judgment and that the real estate of the bankrupt estate is free from the lien of said judgment;

[fol. 5] (b) directing the United States National Bank of Johnstown to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the lien of said judgment, if any;

(c) reducing the claim of said United States National Bank of Johnstown to the sum of $10,000 and allowing the same as unsecured or general claim in that amount.

(d) directing that the United States National Bank of Johnstown refund to the bankrupt estate all payments received by it from the sale of the Bankrupt's real estate.

(e) directing that the United States National Bank of Johnstown refund to the bankrupt estate all dividends received by it in excess of the amount distributable on the correct amount of its general claim, to wit $10,000; And for such other and further relief as may be just and proper.

Dated: New York, N. Y., October 9, 1942.

Yours, etc., Milbank, Tweed & Hope, 15 Broad Street, New York, N. Y., Attorneys for Petitioner.

To: Lester Larimer, Esq., Trustee in Bankruptcy, Ebensburg, Penna., United States National Bank of Johnstown, Johnstown, Penna.

[fol. 6] In United States District Court

Petition

To Hon. C. R. Myers, Referee in Bankruptcy:

The petition of The Chase National Bank of the City of New York respectfully alleges and shows to this Court as follows:

1. That your petitioner is a national banking association, duly organized and existing under and by virtue of the laws of the United States of America, with its office and principal place of business at 18 Pine Street, New York, N. Y.

2. Your petitioner is successor by merger and consolidation to The Equitable Trust Company of New York and is a creditor of the above named bankrupt, a proof of claim having been duly filed herein by the said The Equitable Trust Company of New York on June 29, 1926 and said claim having been thereafter and on May 14, 1935 duly allowed as a general claim in the amount of $55,231.98.

3. That among the claims filed in this proceeding was one filed, on or about January 8, 1927, in the amount of $10,000 by The United States National Bank of Johnstown (hereinafter referred to as the Johnstown Bank). A copy of the said claim is annexed hereto and marked Exhibit A.

4. That thereafter and on or about July 14, 1932, the said Johnstown Bank filed an amended liquidated claim herein in the amount of $13,685. A copy of said amended liquidated claim is annexed hereto and marked Exhibit B. Upon information and belief the difference in the amounts of the said claim, and the amended liquidated claim in the sum of $3,685 represents interest on [fol. 7] the judgment hereinafter referred to from the date of entry thereof to and including July 13, 1932.

5. That in both the said claim and amended liquidated claim the said Johnstown Bank alleged it received no security for its claim other than the judgment entered against the bankrupt herein at the June 1925 term of the Court of Common Pleas, Cambria County, State of Pennsylvania; said claimant since the filing of said claim has asserted that it has a lien upon the real property of the bankrupt herein under and by virtue of said judgment.

6. That, upon information and belief, the value of the said alleged lien has never been fixed in this proceeding.

7. That despite the fact that the value of said claimant's alleged lien as security was never fixed as required by the Bankruptcy Act, said Johnstown Bank received and accepted dividends arising from the general assets of the bankrupt estate on the full face amount on its amended claim; to wit on $13,685. These said dividends were paid and accepted by said claimant on the following dates and in the following amounts:

November 27, 1935	$ 478.97
August 28, 1936	600.90
February 21, 1938	239.92
March 9, 1939	174.62
April 22, 1940	255.98
April 7, 1941	354.74
March 16, 1942	329.93
	$2,435.06

8. Upon information and belief, the said Johnstown Bank by proving the full amount of its claim and [fol. 8] receiving and accepting dividends thereon waived any security or lien which it may have had under and by virtue of said judgment.

9. That notwithstanding the waiver of its alleged lien and security as aforesaid, said claimant, the Johnstown Bank, received and accepted the following payments representing the proceeds of the sale of real property of the bankrupt alleged to be subject to the alleged lien of the aforesaid judgment.

May 9, 1939	$ 516.66
May 22, 1939	315.41
April 7, 1941	464.36
March 16, 1942	68.33
	$1,364.76

That by reason of the foregoing facts the said payments were unauthorized and should be refunded to the estate.

10. That the claimant, Johnstown Bank, was not entitled to prove any claim for interest subsequent to the date of bankruptcy; that the amended claim in so far as it included a claim for interest subsequent to the date of bankruptcy is excessive and should be reduced; that said claimant is entitled to retain only such portion of the dividends received by it, referred to in Paragraph 7 hereof, as would have been distributed upon a claim in the amount of $10,000 and the excess of said dividends should be refunded to the bankrupt estate.

Wherefore, your petitioner prays for an order

(a) Adjudging and decreeing that said United States National Bank of Johnstown waived any lien it may have had by virtue of the said judgment, that it [fol. 9] waived any security interest represented by said judgment and that the real estate of the bankrupt estate is free from the lien of said judgment.

(b) Directing the United States National Bank of Johnstown to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the lien of said judgment, if any.

(c) Reducing the claim of said United States National Bank of Johnstown to the sum of $10,000 and allowing the same as an unsecured or general claim in that amount.

(d) Directing that the United States National Bank of Johnstown refund to the bankrupt estate all payments received by it from the sale of the bankrupt's real estate.

(e) Directing that the United States National Bank of Johnstown refund to the bankrupt estate all dividends received by it in excess of the amount distributable on the correct amount of its general claim, to wit $10,000.

Dated: New York, N. Y., October 9, 1942.

The Chase National Bank of the City of New York,
By /s/ E. W. Allen, Assistant Cashier.

Verified October 9, 1942.

[fol. 10] EXHIBIT "A" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

In the Matter of HARVEY C. STINEMAN, Bankrupt.

In the Bankruptcy #12,786

At Johnstown, in the western District of Pennsylvania, on the 7th day of January, 1927, came F. C. Martin of The United States National Bank of Johnstown in the said District of Western Pennsylvania, and made oath and says that:—

He is Cashier of The United States National Bank of Johnstown, a corporation incorporated by and under the laws of the United States and carrying on business in Johnstown in the County of Cambria and that he is duly authorized to make this proof and says that the said Harvey C. Stineman, the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to said corporation, in the sum of Ten Thousand ($10,000.00) Dollars; that the consideration of the said debt is as follows:

Money Loaned

more particularly set forth in the itemized account hereto annexed and made a part of this proof; and no part of said debt has been paid (except as shown by said account); that there is no set-off or counterclaim to same, except as shown by said account.

[fol. 11] That the said The United States National Bank of Johnstown has not, nor has any person by its order, or to the knowledge and belief of said deponent, for its use, had or received any manner of security whatever, or any note for such account; nor has any judgment been rendered thereon.

And that the only securities held by the said The United States National Bank of Johnstown for said debt are the following: Judgment entered on the 26th March, 1925, in the Court of Common Pleas of Cambria County to No. 225 June Term, 1925, The United States National Bank of Johnstown v. Harvey C. Stineman.

(Sgd) F. P. Martin

Sworn and subscribed to before me this seventh day of January, 1927. (Sgd) Jessie N. Helsel, Notary Public.

My commission expires 2 March 1929. (N. P. Seal)

[fol. 12] EXHIBIT "B" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Matter of HARVEY C. STINEMAN, a bankrupt.

No. 12786 In Bankruptcy

Amended Liquidated Claim

At Johnstown, in the Western District of Pennsylvania, on the 13th day of July, 1932, came F. C. Martin, Cashier of The United States National Bank of Johnstown, in the said District of Western Pennsylvania, and made oath and says that:

He is the Cashier of The United States National Bank of Johnstown, a corporation incorporated by and under the laws of the United States, and carrying on business in the City of Johnstown, County of Cambria, and State of Pennsylvania, and that he is the duly authorized officer to make this proof and says that the said Harvey C. Stineman, the person by (or against) whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition, and still is justly indebted to said corporation, in the sum of Thirteen thousand six hundred and eighty-five ($13,685.00) dollars, with interest on the sum of Thirteen thousand one hundred and eighty-five ($13,185.00) dollars, from June 9, 1930, together with twenty-nine dollars and 80/100 ($29.80) costs of entry of judgment entered originally against Harvey C. Stineman in his lifetime to [fol. 13] No. 225 June Term, 1925, in the Court of Common Pleas of Cambria County, and revivals thereof on sci fas against Lester Larimer, Trustee in Bankruptcy, Harriet B. Stineman, executrix, and Cecelia Stineman, et al., terre tenants, and that the consideration of the said debt is as follows: For money loaned Harvey C. Stineman in his lifetime as more particularly set forth above; that no part of said debt has been paid except None; that there are no set-offs or counter-claims to the same.

That the said The United States National Bank of Johnstown has not, nor has any person by its order, or to the knowledge and belief of said deponent, for its use,

had or received any manner of security whatever, excepting the above judgment.

(Sgd) F. P. Martin, Cashier.

Sworn to and subscribed before me this 13th day of July, 1932. (Sgd) Hazel R. Blough, Notary Public.

My commission expires March 9, 1935 (N. P. Seal)

[fol. 14] In United States District Court

Notice of Motion

Sirs:

Please take notice that upon the annexed petition of The Chase National Bank of the City of New York, verified the 30th day of October, 1942, a motion will be made before the Hon. C. R. Myers, Referee in Bankruptcy herein, at 10 a.m. on the 13th day of November, 1942, at his office at 213 South Center Street, Ebensburg, Pa., or as soon thereafter as counsel can be heard for an order.

(a) adjudging and decreeing that The First National Bank of South Fork waived any lien it may have had under and by virtue of a judgment in the amount of $11,290.00 entered against the bankrupt herein at the September, 1925 Term of the Court of Common Pleas, Cambria County, Pa., that it waived any security interest represented by said judgment and that the real estate of the bankrupt estate herein is free from the lien of said judgment;

(b) directing The First National Bank of South Fork to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the lien of said judgment, if any;

(c) directing The First National Bank of South Fork to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the judgments entered in favor of said The First National Bank of South Fork against the bankrupt herein at the June, 1926 Term of the Court of Common Pleas, Cambria

County, Pa., in the respective amounts of $5,520.00 and $1,653.45;

[fol. 15] (d) allowing the claim of The First National Bank of South Fork in the sum of $18,463.45 as an unsecured and general claim in that amount;

And for such other, further and different relief as to the Court may be just and proper.

Dated: New York, N. Y., October 30, 1942.

Yours, etc., Milbank, Tweed & Hope, 15 Broad Street, New York, N. Y., Attorneys for petitioner.

To: H. G. Englehart, Esq., Ebensburg, Pa., Attorney for Trustee, Lester Larimer, Ray Patton Smith, Esq., 302-303 Johnstown Trust Bldg., Johnstown, Pa., Attorney for The First National Bank of South Fork.

IN UNITED STATES DISTRICT COURT

PETITION

To Hon. C. R. Myers, Referee in Bankruptcy:

The petition of The Chase National Bank of the City of New York respectfully alleges and shows to this Court as follows:

1. That your petitioner is a national banking association, duly organized and existing under and by virtue of the laws of the United States of America, with its office and principal place of business at 18 Pine Street, New York, N. Y.

[fol. 16] 2. Your petitioner is successor by merger and consolidation to The Equitable Trust Company of New York and is a creditor of the above-named bankrupt, a proof of claim having been duly filed herein by the said The Equitable Trust Company of New York on June 29, 1926 and said claim having been thereafter and on May 14, 1935 duly allowed as a general claim in the amount of $55,231.98.

3. That among the claims filed in this proceeding was one filed on or about June 29, 1926, in the amount of $18,463.45 by The First National Bank of South Fork

(herein referred to as the "South Fork Bank"). A copy of said claim is annexed hereto and marked Exhibit A.

4. That said claim is based upon judgments entered in favor of the said South Fork Bank against the bankrupt herein at the times and in the amounts as follows:

Date of Entry	Amount
September, 1925	$11,290.00
June, 1926	5,520.00
June, 1926	1,653.45
Total	$18,463.45

5. That, upon information and belief, the said South Fork Bank since the filing of said claim has asserted that it has a lien upon the real property of the bankrupt herein under and by virtue of the said judgment in the amount of $11,290.00 entered at the September, 1925 Term of the Court of Common Pleas, Cambria County, Pa., but has not asserted a lien against the real property of the bankrupt under the judgments in the respective amounts [fol. 17] of $5,520.00 and $1,653.45 entered at the June, 1926 Term of said Court of Cambria County, Pa., for the reason that the said judgments were entered within four months of the date of the filing of the petition herein by the bankrupt.

6. That, upon information and belief, the said South Fork Bank has failed to revive the said judgments since the date of entry of the same.

7. That, upon information and belief, the value of the alleged lien of the said judgment in the amount of $11,290.00 has never been fixed in this proceeding.

8. That despite the fact that the value of said South Fork Bank's alleged lien as security was never fixed as required by the Bankruptcy Act, said South Fork Bank received and accepted dividends arising from the general assets of the bankrupt estate on the full face amount of its claim; to wit on $18,463.45. These said dividends were paid and accepted by said South Fork Bank on the following dates and in the following amounts:

November 25, 1935	$ 646.22
April 25, 1936	810.73
February 16, 1938	323.69
March 3, 1939	235.59
April 16, 1940	345.36
April 7, 1941	478.61
March 11, 1942	445.15
Total	$3,285.35

9. That, upon information and belief, the said South Fork Bank by proving that full amount of its claim and receiving and accepting dividends thereon waived any security or lien which it may have had under and [fol. 18] by virtue of any judgment entered in its favor against the bankrupt herein.

10. That, upon information and belief, the failure of the said South Fork Bank to revive any or all of the said judgments constitutes a waiver of any lien it may have had under and by virtue of said judgments.

Wherefore, your petitioner prays for an order

(a) adjudging and decreeing that the said The First National Bank of South Fork waived any lien it may have had under and by virtue of a judgment in the amount of $11,290.00 entered against the bankrupt herein at the September, 1925 Term of the Court of Common Pleas, Cambria County, Pa., that it waived any security interest represented by said judgment and that the real estate of the bankrupt estate herein is free from the lien of said judgment;

(b) directing the said The First National Bank of South Fork to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the lien of said judgment, if any;

(c) directing the said The First National Bank of South Fork to execute and deliver to the Trustee herein all papers necessary and proper to discharge of record the judgments entered in favor of the said The First National Bank of South Fork against the bankrupt herein at the June, 1926 Term of the Court of Common Pleas,

Cambria County, Pa., in the respective amounts of $5,520.00 and $1,653.45;

(d) allowing the claim of the said The First Na-[fol. 19] tional Bank of South Fork in the sum of $18,463.45 as an unsecured and general claim in that amount.

Dated: New York, N. Y., October 30, 1942.

The Chase National Bank of the City of New York,
By (Sgd.) E. W. Allen, Assistant Cashier.
(Verified October 30, 1942)

EXHIBIT "A" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Matter of HARVEY C. STINEMAN, Bankrupt.

No. 12756 In Bankruptcy

At South Fork, in said District of Penn'a on the 28th day of June, A. D. 1926, came W. C. Stricker, of South Fork, in the County of Cambria, and State of Pennsylvania, and made oath, and says that he is Cashier of The First National Bank of South Fork, South Fork, Pennsylvania, a corporation incorporated by and under the laws of the State of Pennsylvania, and carrying on business at South Fork, in the County of Cambria, and State of Pennsylvania, and that he is duly authorized to make this proof, and says that the said Harvey C. Stineman, the person by (or against) whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of Eighteen Thousand Four Hundred Sixty-three and Forty-five one-[fol. 20] hundredth Dollars, that the consideration of said debt is as follows:

Judgments entered in Cambria County as follows:

Plaintiff	Defendant	No. & Term	Amount.
The First National Bank of South Fork, Pa.	Harvey C. Stineman	#639 Sept. Term, 1925	$11,290.00
James Gregory, to the use of The First National Bank of South Fork, Pa.	Harvey C. Stineman	#42 June Term, 1926	$ 5,520.00
The First National Bank of South Fork, Pa.	Harvey C. Stineman	#44 June Term, 1926	$ 1,653.45
		Total,	$18,463.45

that no part of said debt has been paid (except none that there are no set-offs or counterclaims to the same (except none and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment rendered thereon.

The First National Bank of South Fork, By (Sgd.) W. C. Stricker, Cashier of said Corporation

Subscribed and sworn to before me this 28th day of June, A. D., 1926.

(Sgd.) Claire Salinger, Notary Public, My Commission expires March 6, 1927.

[fol. 21] IN UNITED STATES DISTRICT COURT

ANSWER TO PETITION OF CHASE NATIONAL BANK OF THE CITY OF NEW YORK

The answer of the United States National Bank in Johnstown, assignee of The United States National Bank of Johnstown, plaintiff in the within mentioned judgment and claimant, to the averments contained in the petition of the Chase National Bank of the City of New York respectfully represents:

1. The averments contained in paragraph 1 of said petition are admitted.

2. The averments contained in paragraph 2 of said petition are admitted.

3. The averments contained in paragraph 3 of said petition are admitted.

4. The averments in paragraph 4 of said petition are admitted with the exception that it is averred the sum of $3685.00 mentioned therein represents interest, attorneys commission and costs.

5. The averments contained in paragraph 5 of said petition are admitted.

6. It is admitted that the value of the lien of said judgment against the bankrupt's real estate has never been fixed, but it is averred that this omission was at the request of the Trustee and the unsecured creditors, including The Chase National Bank of the City of New York.

7. The averments contained in paragraph 7 of said petition are denied. The United States National Bank of Johnstown went into liquidation in 1933, and the dividends as listed under dates of November 27, 1935 to [fol. 22] April 7, 1941 were paid to its liquidating trustees. The United States National Bank in Johnstown was organized in 1933, and on the 29th day of December, 1941, purchased the remaining assets of The United States National Bank of Johnstown, including its claim against the Harvey C. Stineman bankrupt estate, and the dividend of March 16, 1942 was paid to it. It is further averred that the said dividends were paid and received under a plan for distribution suggested by the Trustee and the unsecured creditors, including The Chase National Bank, as fully recited in paragraph 11 of this answer.

8. The averments contained in paragraph 8 of said petition are denied, and on the contrary it is averred that The United States National Bank of Johnstown, throughout the administration of this estate, has consistently asserted its right as a first lien judgment cred-

itor, as further appears from the exhibits attached to the petitioner's petition.

9. It is admitted that the Liquidating Trustees of The United States National Bank of Johnstown received the payments made on May 9, 1939 to April 7, 1941, both inclusive and the United States National Bank in Johnstown received the payment made March 16, 1942 as averred in paragraph 9, but the conclusions arrived at by the petitioner, to wit: "That by reason of the foregoing facts the said payments were unauthorized and should be refunded to the estate" are denied.

10. The averments contained in paragraph 10 of said petition are based upon a legal conclusion which is denied. As hereinafter set forth, the facts upon which said dividends were paid fully warranted the distributions as made.

[fol. 23] 11. As a further answer to said petition Respondent shows and avers that the claim filed is based upon and expressly reserves a lien upon which it is based, as shown by the attached exhibits to said petition, and further than any payments paid to Respondent or its predecessor in title were by and with the consent of the Trustee and of all creditors of said bankrupt estate, and particularly upon motion of the said petitioner, Chase National Bank. Prior to and at the date of the adjudication of Harvey C. Stineman as a bankrupt, on the 10th day of June, 1926 The United States National Bank of Johnstown held a first judgment lien against his real estate which consisted of an undivided one-sixth interest in the real estate of Jacob C. Stineman Estate. Lester Larimer, Trustee, did nothing towards liquidating the real estate, and during the year 1931 the said The United States National Bank of Johnstown gave notice of its intention to foreclose on its lien. It was the concensus of opinion of the unsecured creditors, including Chase National Bank and the Trustee, that the real estate had a value far in excess of the amounts of the liens, and that it would be desirable and advantageous to the bankrupt estate if the Trustee was given time to liquidate the real estate. As an inducement to The United States National Bank of Johnstown to withhold execution for

the time, it was proposed on or about May 4, 1932 by Chase National Bank and the other unsecured creditors that the said Bank should file an amended claim, by adding accrued interest and attorneys commission thereto, that it should be first paid the proceeds from the sale of real estate, and that it should participate pro rata with unsecured creditors in the distribution of funds derived from royalties, rents and other personal property. The unsecured creditors believed that the real [fol. 24] estate would be sold for much more than would be required to pay the said judgment debt with interest, attorneys commission and costs.

12. The liquidating Trustees of The United States National Bank of Johnstown have completed liquidation of the same by disbursing a final dividend and are now without funds or assets of any kind.

Wherefore, Respondent prays that the petition of The Chase National Bank of the City of New York aforesaid be dismissed with costs.

United States National Bank in Johnstown, By .....Cashier.

Duly sworn to by F. C. Martin. Jurat omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

OPINION—June 7, 1943

This bankruptcy proceeding has some unusual aspects. Contrary to the ordinary policy of early liquidation, the general creditors without exception, have approved the policy of the Trustee in retaining intact the assets of the estate and accepting the income therefrom. The wisdom of this procedure is quite apparent. The assets which would have been sold for an insignificant amount, have, through the years, produced substantial income which has been distributed to creditors in the way of dividends. In order to administer the estate on this basis, it was necessary to have the approval of the two lien creditors for the reason that it would have been inequitable to demand that the security for their liens, con-

sisting of an undivided interest in certain real estate, be kept intact for an indefinite period rather than to be sold in order to liquidate the liens. It was asumed from the outset that there was sufficient security in the way of real estate against which the two judgments, the first of which was that of United States National Bank of Johnstown, and the other the judgment of First National Bank of South Fork, were liens, to pay them in full, together with interest and costs.

The adjudication was made June 10, 1926 and at the first meeting of creditors, the Equitable Trust Company of New York filed its claim and was represented by counsel. The claim was subsequently amended to show that The Chase National Bank of the City of New York was the successor by consolidation and merger of The Equitable Trust Company of the City of New York. The original claim had a Letter of Attorney attached thereto, authorizing counsel (P. J. Little, Esq.) to represent the claimant in the election of a Trustee, and subsequently, [fol. 26] to wit: on November 18, 1929, at a meeting called to pass upon the First Account of the Trustee, claimant's counsel (P. J. Little, Esq.) who had been appointed counsel for the Trustee appeared and suggested on the record,

> "That the balance of the fund in the hands of the Trustee as shown by his Last Account, after payment of costs, be awarded to the United States National Bank of Johnstown, as first lienor."

Subsequently, to wit: at a meeting at which The Chase National Bank of the City of New York was represented by counsel, the following statement was made by counsel for the Trustee (P. J. Little, Esq.): (See Page 1 of Testimony taken December 31, 1929)

> "It was at the suggestion of myself, I think, that the order was made to pay this money to the first judgment creditor, with the thought that the two judgments which were liens on real estate being out of the way, we would have a clear sailing for prorated dividends thereafter. My clients, after the suggestion was made, decided that they could not acquiesce in the suggestion, and requested me to file exceptions, which I was obliged to do. After dis-

cussing this with Mr. Keefe, (Arthur John Keefe, Esq., of Murray, Aldrich and Webb, Attorneys for Claimant, who also appeared at the meeting), and going over the matter generally, and after examining two of the leases from which the royalties were obtained in order to make up part of the fund for distribution, we suggest that under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from [fol. 27] any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rate *among all the creditors.*"

This plan, which was a basis of subsequent distributions had in contemplation paying off the lienors as soon as possible so that the estate would remain intact and all future funds derived from the estate would be prorated among the general creditors. During the period from November 15, 1935 to December 2, 1942, seven dividends have been paid on this basis, all of which have been acquiesced in by The Chase National Bank of the City of New York as well as all other creditors.

On October 17, 1942, The Chase National Bank of the City of New York filed its petition for an order (a) adjudging that the United States National Bank of Johnstown waived any lien it may have had by virtue of its judgment against the real estate of the bankrupt estate and directing that the lien of said judgment be discharged, and (b) that the claim of the United States National Bank of Johnstown be reduced to $10,000.00 and that an order be made directing said claimant to refund to the bankrupt estate all payments received from the sale of real estate and any dividends received by it in excess of $10,000.00.

As to this last matter, the records show that on January 8, 1927, United States National Bank filed its claim in the amount of $10,000.00 which was allowed. Subsequently, on July 14, 1932, an amended claim in the amount of $13,685.00, which purports to represent the face amount of the claim, together with interest thereon from July 9, 1930, was filed and allowed. The claim in

[fol. 28] the latter amount was used as a basis for participation in the dividends which have been declared in this estate.

There is nothing in the Bankruptcy Act which would permit any creditor to participate in the distribution of the funds of the estate by way of dividends in an amount in excess of the amount of the claim as of date of the filing of the petition in Bankruptcy. This, however, does not apply to funds received from security which is held by the creditor as collateral for the payment of the claim. Section 63 (a) of the Bankruptcy Act provides,

> "Debts of the bankrupt may be proved and allowed against his estates which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing *at the time of the filing of the petition* by or against him, whether then payable or not, with any interest thereon which would have been recoverable *at that date.*"

While it was contemplated, that by reason of the forbearance of the United States National Bank of Johnstown in not insisting on the liquidation of the estate and thus determining the value of the security, that it was pro rate with the general creditors in the funds derived from the personalty estate, there was no agreement which would permit the payment of dividends to it on an amount which would exceed the amount actually due it on the date of the institution of the bankruptcy proceedings.

The Bankruptcy Court has far reaching powers in passing on an allowance of claims, and it is not necessary for the Trustee or other creditors to object to the allowance thereof in order to give the Court jurisdiction to pass on the merits of the claim. (Pepper v. Litton, [fol. 29] 308 U. S. 295—41 Am. Br. Reports N. S. 279) and Section 57k of the Bankruptcy Act of 1938 provides,

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

As the allowance of the claim was clearly erroneous and the said claimant has received an amount in

the way of dividends in excess of the amount to which it was entitled, dividends from the personalty fund in excess of the amount of the claim at the time of the filing of the petition must be refunded to the estate. The fact that the dividends have been erroneously paid to the claimant on numerous occasions would not give the claim any better standing. Section 57 (1) of the Bankruptcy Act of 1938 provides,

> "Whenever a claim shall have been reconsidered and rejected, whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the Trustee may also recover any excess dividend paid to any creditor. The Court shall have summary jurisdiction of a proceeding by the Trustee to recover any such dividends."

The other question for review is the status of the lien of the United States National Bank of Johnstown and the other lien creditor, First National Bank of South Fork, since they have received dividends from the personalty fund in the estate. It is conceded that in the ordinary course dividends are only paid to claimants whose claims do not have priority or are secured, (Sec- [fol. 30] tion 65 of the Bankruptcy Act of 1938), with the exception, in the case of secured claims, the value of the security shall be determined, the amount thereof credited to the claims and a dividend shall be declared on the unpaid balance. (Section 57 h of the Bankruptcy Act of 1938). The question then arises whether or not these lienors have surrendered their security by reason of their acceptance of the plan of distribution which was proposed by the Trustee and which had the approval of creditors.

The matter was approached on this theory—the security was worth more than the liens against it; and it would be an advantage to the unsecured creditors to have the estate remain intact—to accomplish this purpose the lienors should be importuned not to liquidate their security—that it would be to the advantage of general creditors to get the lien creditors out of the road

—that as an inducement for not selling their security —the lienors would be permitted to participate in the dividends from the personalty with other creditors—all this with the understanding that the liens were to remain intact until the claims were paid in full.

This was the proposition of the bankrupt estate acting through its Trustee and with the concurrence of the principal creditors. The proposition was equitable and to the best interests of all the creditors. The agreement was approved by the Court as is evidenced by the seven dividends made according to the plan. It is now proposed to modify the agreement and penalize the lienors who accepted the plan proposed by the Trustee and acquiesced in by creditors. It cannot be inferred that there was any intent at any time by the lienors to waive their security as the records indicate that the [fol. 31] United States National Bank of Johnstown has very carefully revived its judgment during each five year period and in doing so made the Trustee in Bankruptcy in this estate a party to the proceedings. The judgment of the First National Bank of South Fork has also been revived. The estate should not take advantage of a situation which has added materially in the production of substantial benefits to creditors, and especially since the lien holders could not liquidate their security without leave of the Bankruptcy Court. Isaacs v. Hobbs Tie and Timber Company, 282 U. S. 734, 17 Am. Br. (N. S.) 273.

> "The custody, powers and responsibility of the bankruptcy court prevail over any contractual right, and any creditor who is satisfied to lend money or extend credit on a security of the mortgage type does so subject to that paramount judicial power based on the possession of the court and its officers. *This power will be exercised with all due consideration for the interests of the mortgagee and his bargained-for right to decide whether a present sale is necessary for his protection.* Yet since the power exists, no matter how moderately it may be exercised, it is undeniable that the mortgagee, as far as his contractual powers and privileges are concerned, must look for their protection primarily to the bankruptcy court, *whose attitude will be guided by what under the circumstances appears to be in the best interests of all*

parties concerned, secured creditors and unsecured. (Collier on Bankruptcy, 14th Edition, Volume 3, Page 272.)"

The surrender of security can be inferred from certain Acts but it was clearly not the intention of either the lien holders in this case to surrender or waive their securities. [fol. 32] While the power was in the Bankruptcy Court to prevent the sale of the security, it would not be equitable, nor would the Court be justified in setting aside the lienor's contractual rights for a long period of years.

In the plan, which was adopted, it was provided that the funds derived from the sale of the real estate be awarded to the first judgment creditor and the second fund (meaning the personalty fund) be divided pro rata among *all* the creditors. This has accordingly been done. It could not reasonably be presumed that the second lien creditor (First National Bank of South Fork) would stand idly by for a long number of years without receiving any remuneration and not insist that the security for its lien be liquidated.

In the matter of Savoia Macaroni Mfg. Co., Inc. (C.C.A. 2d Cir.) 30 Am. B. R. (N. S.) 216, 79 F. (2d) 530, the Court said:

> "The cause for the agreement in the instant case is forbearance in the exercise of the rights of action, but this does not mean that the status of the rights as liens should be affected by mere agreement to stay the exercise of the rights. Forbearance does not mean surrender."

As there are clear indications that the lienors had no intention of relinquishing their liens, and the consideration to be given in a case of this kind is based primarily on equitable principles, the petition relating to the status of the lien creditors must be denied.

ORDER—June 7, 1943

And now, June 7, 1943, the foregoing petition having been read and considered and after a hearing at which both the petitioner and respondent were repre- [fol. 33] sented by counsel, it is ordered that the petition

be and hereby is denied, with the exception that the claim of The United States National Bank of Johnstown, Pa. is fixed as a basis for dividends from the personalty fund at $10,000.00. Dividends heretofore received from said fund by said claimant on an amount in excess of $10,000.00, are to be refunded to the Estate.

C. R. Myers, Referee in Bankruptcy.

ORDER—June 7, 1943.

And now, June 7, 1943, the foregoing petition having been read and considered and after argument, both on behalf of the petitioner and the respondent, it is ordered that the petition be and hereby is denied.

C. R. Myers, Referee in Bankruptcy.

ORDER—June 7, 1943

And now, June 7, 1943, the foregoing petition having been read and considered and after a hearing at which both the petitioner and respondent were represented by counsel, it is ordered that the petition be and hereby is denied, with the exception that the claim of The United States National Bank of Johnstown, Pa. is fixed as a basis for dividends from the personalty fund at $10,000.00. Dividends heretofore received from said fund by said claimant on an amount in excess of $10,000.00, are to be refunded to the Estate.

C. R. Myers, Referee in Bankruptcy.

[fol. 34] IN UNITED STATES DISTRICT COURT

PETITION TO REVIEW REFEREE'S ORDER—June 15, 1943

To Hon. C. R. Myers, Referee in Bankruptcy:

The petition of The Chase National Bank of the City of New York respectfully shows:

1. That your petitioner is a creditor of Harvey C. Stineman, the Bankrupt above-named, its claim having been duly allowed herein on May 14, 1935 as a general claim in the amount of $55,231.98.

2. That by petition dated October 30, 1942 the said The Chase National Bank of the City of New York moved this Court for an order adjudging and decreeing among other things that the First National Bank of South Fork, a creditor herein, by accepting dividends from the general assets of the estate, waived any lien it might have had by virtue of a judgment entered against the Bankrupt herein at the September, 1923 term of the Court of Common Pleas, Cambria County, Pennsylvania, that it waived any security interest represented by said judgment and that the real estate of the Bankrupt estate is free from the lien of said judgment.

3. That thereafter and on June 7, 1943 an order, a copy of which is annexed hereto was made and entered herein denying the said motion of The Chase National Bank of the City of New York.

4. That such order was and is erroneous in that the Referee herein failed to find that the said First National Bank of South Fork, having accepted dividends from the general estate of the Bankrupt, without having its alleged security valued and by participating in the distribution of the assets from the general estate, had placed itself on a par with genera. creditors and [fol. 35] thereby waived any lien it might have had by virtue of said judgment. The Referee's order is contrary to Sections 57h and 65 of the Bankruptcy Act, as amended. The Referee also erred in interpreting and applying the law and the said motion of The Chase National Bank of the City of New York should have been granted in toto.

Wherefore, petitioner feeling aggrieved because of such order prays that the same be reviewed as provided for in Section 39(c) of the Bankruptcy Act, as amended.

Dated: New York, N. Y., June 15, 1943.

The Chase National Bank of the City of New York,
By (Sgd.) E. W. Allen, Assistant Cashier, Petitioner.

Milbank, Tweed & Hope, Attorneys for The Chase National Bank of the City of New York, Objecting Creditor.

(Verified June 15, 1943)

IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION TO REVIEW—June 7, 1943

And now, June 7, 1943, the foregoing petition having been read and considered and after argument, both on behalf of the petitioner and the respondent, it is ordered that the petition be and hereby is denied.

C. R. Myers, Referee in Bankruptcy.

[Vol. 36] IN UNITED STATES DISTRICT COURT

PETITION TO REVIEW REFEREE'S ORDER—June 15, 1943

To Hon. C. R. Myers, Referee in Bankruptcy:

The petition of The Chase National Bank of the City of New York respectfully shows:

1. That your petitioner is a creditor of Harvey C. Stineman, the Bankrupt above-named, its claim having been duly allowed herein on May 14, 1935 as a general claim in the amount of $55,231.98.

2. That by petition dated October 9, 1942 the said The Chase National Bank of the City of New York moved this Court for an order adjudging and decreeing among other things that the United States National Bank of Johnstown, a creditor herein, by accepting dividends from the general assets of the estate, waived any lien it might have had by virtue of a judgment entered against the Bankrupt herein at the June, 1925 term of the Court of Common Pleas, Cambria County, Pennsylvania, that it waived any security interest, represented by said judgment, that the real estate of the Bankrupt estate is free from the lien of said judgment and that said United States National Bank of Johnstown be directed to refund to the Bankrupt estate all dividends received by it in excess of the amount distributable on the correct amount of its general claim, to wit $10,000.

3. That thereafter and on June 7, 1943 an order, a copy of which is annexed hereto was made and entered herein denying the said motion of The Chase National Bank of the City of New York, except as to the request for the refunding of the dividends based upon interest accruing after the date of bankruptcy.

[fol. 37] 4. That such order was and is erroneous in that the Referee herein failed to find that the said United States National Bank of Johnstown, having accepted dividends from the general estate of the bankrupt, without having its alleged security valued and by participating in the distribution of the assets from the general estate, had placed itself on a par with general creditors and thereby waived any lien it might have had by virtue of said judgment. The Referee's order is contrary to Sections 57h and 65 of the Bankruptcy Act, as amended. The Referee also erred in interpreting and applying the law and the said motion of The Chase National Bank of the City of New York should have been granted in toto.

Wherefore, petitioner feeling aggrieved because of such order prays that the same be reviewed as provided for in Section 39(c) of the Bankruptcy Act as amended.

Dated: New York, N. Y., June 15, 1943.

The Chase National Bank of the City of New York,
By (Sgd.) E. W. Allen, Assistant Cashier,
Petitioner.

Milbank, Tweed & Hope, Attorneys for The Chase National Bank of the City of New York, Objecting Creditor.

(Verified June 15, 1943.)

In United States District Court

Order Denying Petition to Review—June 7, 1943

And now, June 7, 1943, the foregoing petition having been read and considered and after a hearing at which both [fol. 38] the petitioner and respondent were represented by counsel, it is ordered that the petition be and hereby is denied, with the exception that the claim of The United States National Bank of Johnstown, Pa., is fixed as a basis for dividends from the personalty fund at $10,000.00. Dividends heretofore received from said fund by said claimant on an amount in excess of $10,000.00, are to be refunded to the Estate.

C. R. Myers, Referee in Bankruptcy.

In United States District Court

Petition of United States National Bank of Johnstown —June 16, 1943

To C. R. Myers, Referee in Bankruptcy:

Your petitioner, the United States National Bank in Johnstown, a corporation, respectfully shows:

That your petitioner is a creditor of Harvey C. Stineman, the above named bankrupt, and that its claim and amended liquidated claim has been allowed herein.

That the United States National Bank in Johnstown acquired title to said claim by purchase for value from the United States National Bank of Johnstown on the 29th day of December, 1941.

That on the 7th day of June, 1943, an order, a copy of which is hereto annexed, was made and entered herein.

That said order was, and is, erroneous in that it fixed as a basis for dividends out of the personalty fund the claim at $10,000.00, thereby reducing the claim on application of the Chase National Bank of the City of New York, a creditor, from $13,685.00, and as the same was filed and allowed by the referee and creditors on or about July 13, 1932.

That the referee erred in giving consideration to the petition of the said creditor without demand having first [fol. 39] been made on the trustee to take action questioning the amount of the said claim.

The referee erred in making the order complained of upon the petition of the said creditor to which a responsive answer had been filed, and wherein it was averred, among other things, that in consideration of the United States National Bank of Johnstown forbearing to foreclose upon its first lien against the real estate of the bankrupt, that it would be entitled to prove its claim with interest, which averments in the answer must be taken as proved in the absence of affirmative proof to the contrary.

The answer of the United States National Bank in Johnstown further averred that it had purchased the said claim for value from the United States National Bank of Johnstown on or about the 29th day of December, 1941, and that six of the seven dividends paid thereon to the present time were paid to the liquidating trustees of the United States National Bank of Johnstown.

Since then the liquidating trustees have distributed all funds in their hands and have ceased to function; said order is erroneous and vain, and further petitioner is guilty of laches. Further, the present owner of the claim has not received the alleged excessive dividends.

The responsive answer of the United States National Bank in Johnstown further averred that the said dividends were paid and received under a plan for distribution suggested by the trustee and the unsecured creditors, including the Chase National Bank, as fully recited in Paragraph 11 of the petition, and in the absence of affirmative proof to the contrary, the referee erred in not accepting the averments contained in Paragraph 11 of the answer as verity.

[fol. 40] Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy act and General Order XXVII.

Dated June 16, 1943.

The United States National Bank of Johnstown,
By F. C. Martin, Cashier.
[Verified June 16, 1943.]

IN UNITED STATES DISTRICT COURT

OPINION—August 3, 1944

Gibson, District Judge.

The Chase National Bank of the City of New York, successor to the rights of the Equitable Trust Company of New York, a general creditor of the Bankrupt, filed two petitions with the Referee. In one it asserted that the United States National Bank of Johnstown (to the rights of which the United States National Bank in Johnstown has succeeded) originally filed a claim for $10,000.00, secured by a judgment for that amount. This claim was allowed. Later an amended claim was filed and allowed in the amount of $13,685.00, interest having been added to the first claim. The interest so added had accrued after the first filing. The petition further stated that the Johnstown Bank, despite the fact that it had never had the value of its lien as security fixed as required by law, had partici-

pated in a number of distributions of the general fund on the amount of its claim of $13,685.00, had received several distributions from the realty fund, and still claimed the right to its secured claim. The petition prayed the Referee [fol. 41] to find that the Johnstown Bank, by participating in the distribution of the general fund, had waived its claim as a secured creditor, and also that its original claim of $10,000.00 was correct in amount, but that the addition of interest thereto, accruing after filing, had been improperly allowed. The Referee was asked to order the return to the estate of the amounts received upon the distribution of the realty fund, and also the amounts which had been received upon the distributions of the general fund pursuant to the illegal addition of interest to the original claim.

At the same time that the Johnstown Bank petition was filed the Chase National Bank presented a similar petition against the First National Bank of South Fork, which had filed a secured claim for $11,290.00, and still claimed it as such despite the fact that it had participated in a number of distributions of the general fund to the extent of this claim, and with its other unsecured claims.

The Referee, in respect to the petition against the National Bank of Johnstown, held that the addition of interest to the claim after filing was contrary to the Bankruptcy Act, and ordered that the amounts received pursuant to it be returned by the Bank to the Trustee. He denied the petition, also the petition against the South Fork Bank, insofar as each petition prayed an order declaring that the claimant had waived its status as a secured creditor by participating in the distribution of the general fund. The Chase National Bank had excepted to the refusal of its petition against the National Bank of Johnstown and the South Fork Bank, and has them certified for review. The National Bank in Johnstown has had the order certified for review by which it was directed to return to the Trustee the [fol. 42] amounts received by it upon distribution pursuant to the alleged illegal addition of interest to its claim.

The addition of interest to the original claim of the United States National Bank of Johnstown, the estate being insolvent, was in plain violation of the Bankruptcy Act (Sec. 63a), and the order of the Referee directing

the return of the amount obtained upon past distributions by reason of the addition of interest to it, will be sustained and the exceptions of the United States National Bank in Johnstown dismissed.

The distribution in the instant case, concerning which the Chase National Bank now complains, certainly was not in accord with ordinary practice. That an owner of a secured claim against a bankrupt could participate at all in the distribution of a general fund without first having his security valued and then claiming for the balance, or without waiver of the lien, is beyond regular bankruptcy experience—so far beyond, in fact, that it seems impossible to sustain it.

As related by the Referee and counsel for the local banks some claim could be made for the equity of the distribution despite its failure to follow the requirements of the Bankruptcy Act. It is alleged that the mortgages of the National Bank of Johnstown and of the First National Bank of South Fork were of sufficient value to make those banks secure, but that if they enforced their liens promptly it would tend greatly to the injury of the general creditors. This being so, they were induced by the general creditors to refrain from enforcement by a general agreement that each might participate in the distribution of the general fund to the full amount of its claim and at the same time retain its security until it had been paid the full amount of its claim. It is claimed that this agreement was proposed and [fol. 43] urged by counsel for the Chase National Bank, and that that Bank has allowed distribution to be made from the general fund for some seven years without questioning the right of the Johnstown National Bank and the South Fork Bank to retain the security held by each.

If it were definitely established that the Chase National Bank had full knowledge of the agreement claimed and had benefited as a result of it, and had induced it in fact, this court, despite some qualms induced by the Bankruptcy Act, might well hold that it could not in good faith now attack it. The record, however, is largely in the Referee's Office, but such of it as is before the court does not make it plain that the Chase National Bank or its counsel had the definite understanding claimed. Nothing is to be inferred from the failure to

question the distributions of the general fund. The Chase National Bank might well have assumed that the Johnstown and South Fork Banks had elected to rely upon the general fund and waive their security. Other than the acceptance of the general distributions without protest the only matter asserted to disclose the agreement of the Chase National Bank is a declaration quoted from P. J. Little, Esq., counsel for the Trustee and prior thereto counsel for the Chase National Bank. After reciting that in a meeting called to pass upon the First Account of the Trustee in 1929, he had suggested that the balance be awarded to the United States National Bank of Johnstown as first lienor, and that later he had been required to have that action set aside, in the presence of New York counsel for the Chase National Bank, Mr. Little stated * * * "we suggest that under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds [fol. 44] from any of the leases; the other funds should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors."

By the language quoted a distinction is drawn between the two funds. It seems to be far from even recommending the unusual distribution now asserted to have been its outgrowth, but even if so intended it cannot have the effect of authorizing it. The owner of a secured claim cannot participate to the full amount of the claim in the distribution of both the secured and general funds.

The court is of opinion that the exceptions of the Chase National Bank to the order of the Referee of June 7, 1943, must be sustained and the said order overruled.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING REFEREE'S ORDER—August 3, 1944

And now, to wit, August 3, 1944, the order of the Referee of June 7, 1943, fixing the claim of the United States National Bank of Johnstown against the personalty

fund in the amount of $10,000.00, having come on to be heard for review upon exceptions filed thereto by the United States National Bank of Johnstown, upon consideration thereof, it is ordered, adjudged and decreed that the said order of the Referee be, and hereby is, confirmed and sustained, and the exceptions of said United States National Bank of Johnstown are hereby dismissed.

R. M. Gibson, District Judge.

[fol. 45] In United States District Court

Order Vacating Referee's Order re Claim of First National Bank of South Fork—August 3, 1944

And now, to wit, August 3, 1944, the order of the Referee of June 7, 1943, re claim of the First National Bank of South Fork, having come on to be heard upon review upon exceptions of the Chase National Bank, upon consideration thereof it is ordered, adjudged and decreed that the exceptions of the Chase National Bank be, and hereby are, sustained and said order of the Referee is vacated and set aside; and it is further ordered adjudged and decreed that the First National Bank of South Fork, having accepted dividends from the general estate of the bankrupt upon the total of its secured claim as well of the part unsecured without having its secured claim valued, has thereby waived its secured claim as such and elected to claim as a general creditor under the general fund of said bankrupt's estate; and it is further ordered, adjudged and decreed that said First National Bank of South Fork transfer and assign to the Trustee in Bankruptcy, for distribution among the general creditors, its interest in the mortgage or other security held by it against the estate of the Bankrupt.

R. M. Gibson, District Judge.

[fol. 46] In United States District Court

Petition of United States National Bank of Johnstown for Re-Argument

To the Honorable, Robert M. Gibson, District Judge:

The petition of the United States National Bank in Johnstown, respectfully represents:

1. That on the 3rd day of August, 1944, your Honorable Court made an order, reversing the action of C. Randolph Myers, Referee in Bankruptcy, and adjudged and decreed that the United States National Bank of Johnstown, having accepted dividends from the general estate of the Bankrupt upon the full amount of its claim, without having its security valued, had thereby waived its secured claim as such, and elected to claim as a general creditor.

2. The portions of the record which were certified to the Court by the Referee consisted of the pleadings and the opinion of the Referee upon which his order was based. The opinion contained a summary of the evidence as provided under General Order No. XXVII.

3. From the summary of the evidence as contained in the opinion of the Referee, and the allegations contained in the petition of Chase National Bank the following facts appear:

a. The security of the United States National Bank consisted of a judgment which was a first lien against an undivided interest of the Bankrupt in certain real estate, which had a value far in excess of the debt, interest and costs.

b. All of the creditors, without exception, (this included Chase National Bank) desired that the United States National Bank forego its right to enforce its lien, [fol. 47] so that the estate might be kept intact, and thus permit the Trustee to receive large sums of money by way of income, thus increasing the dividends which creditors could expect to receive.

c. At a meeting of creditors held on December 31, 1929, a stipulation was placed on the record by P. J. Little, Attorney for the Trustee and Chase National Bank, after consultation with Arthur John Keefe, Attorney for Chase National Bank, who was present at the meeting; "that the estate to be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks and bonds. The first fund to go to the first judgment creditor, the second fund to be divided *pro rata among all the creditors.*"

d. The said stipulation was made for the purpose of inducing the United States National Bank to refrain from enforcing its lien.

e. All creditors (including Chase National Bank) benefited from this plan of distribution, for the reason that instead liquidating the assets for a small sum, the Trustee has been able to collect and will continue to collect a substantial amount of income, which has been distributed to creditors by way of dividends.

f. Under the plan of distribution as agreed upon by all creditors and the Trustee, the United States National Bank of Johnstown received seven (7) dividends out of the general fund, and four (4) dividends out of the real estate fund. None of the creditors (including [fol. 48] Chase National Bank) ever objected to the schedules of distribution under which the said dividends were paid.

g. In its proof of claim the United States National Bank asserted that it was secured by the lien of said judgment, and has always maintained its position as a secured creditor. There is no allegation of fraud or concealment.

4. The United States National Bank in Johnstown, filed a responsive answer to the petition of the Chase National Bank, in which answer all the facts set forth in paragraph 3 of this petition were pleaded. The petitioner offered no evidence before the Referee in the hearing held thereon, and the facts as pleaded in the answer should be taken as admitted.

5. The legal effect of the stipulation in the record with the consent of Chase National Bank (3) (e), as well as of all other creditors without exception (3) (b), followed by distributions in accordance therewith, without objections (3) (f), and with all creditors benefiting thereby (3) (e) was as follows:

a. The requirements of Section 57, h. of the Bankruptcy Act have been fully met "by agreement". That is one of the methods provided for valuing securities held by a secured creditor. In effect, the Trustee, and all creditors (including Chase National Bank) agreed that in consideration that the United States National Bank agreed not to

enforce its lien, no value was placed thereon. In addition to the first judgment creditor, being paid the proceeds of the sale of the encumbered real estate, it should also be permitted to share in the distribution of the personal fund.

[fol. 49] b. There was an estoppel both by conduct and by contract.

6. Having shown that the Chase National Bank had full knowledge of the agreement, (3) (c), and benefited as a result of it, (3) (e), and in fact had induced the agreement (3) (c), it would appear that there was manifest error in the court's conclusion, (page 4 of the opinion) that such facts do not appear in the record.

7. Having shown that the agreement as claimed was actually made at a meeting of creditors held on December 31, 1929, and that the agreement as claimed was the basis of the seven distributions between November 27, 1935, and March 16, 1942, it follows; that it is manifestly unjust for Chase National Bank, at this time to seek to have the lien of the judgment of United States National Bank invalidated.

Wherefore, your petitioner prays your Honorable Court to set the above matter down for re-argument, and that a day be fixed so that the interested parties may appear and be heard, and that the order of August 3, 1944, holding that the United States National Bank waived its lien be held suspended until the matter is disposed of on re-argument. The time for taking an appeal to run from the date this petition is finally disposed of.

Harry Doerr, Attorney for United States National Bank in Johnstown, Petitioner, 314 United States National Bank Building, Johnstown, Pa.

[fol. 50] IN UNITED STATES DISTRICT COURT

ORDER GRANTING REARGUMENT—August 24, 1944

And now, to wit, August 24, 1944, the foregoing petition is hereby granted and the order of this Court of August 3, 1944, is hereby suspended pending further hearing as in the petition prayed, and time for taking an appeal

th refrom to run from the date when the instant petition is finally disposed of, and it is further ordered that this matter be referred to this Referee as Special Master to take testimony relative to the averments of the within petition and make known thereof to this Court for consideration of the Court upon the making. Notice of this time and place for taking said testimony to be given all parties in interest by the Referee at least 10 days in advance. This order to apply to the claim of this First National Bank of South Fork as well as to that of the present petition.

R. M. Gibson, D. J.

IN UNITED STATES DISTRICT COURT

[fol. 51] TESTIMONY

Testimony taken before C. Randolph Myers, Referee in Bankruptcy, on October 10, 1944, at 11:00 o'clock A. M., Court Room No. 4, Courthouse, Ebensburg, Pennsylvania:

Appearances: R. Meade Stineman, Esq., for the First National Bank of South Fork, petitioner and respondent in the original matter, also lien creditor; Milbank, Tweed & Hope, by Thomas P. Farley, Esq., attorney for the Chase National Bank in the City of New York; George L. Reade, Esq., for Shearson Hammill & Company; Harry Doerr, Esq. and Roman C. Widmann, Esq., for the United States National Bank in Johnstown, assignee of the claim of the United States National Bank of Johnstown; W. I. Stineman, George Slick, Dr. Edward Pardoe, Norman Hoffman, Samuel Dolan, Directors of the First National Bank of South Fork, a creditor; Francis C. Martin, vice president and cashier of the United States National Bank in Johnstown, a creditor; Lester Larimer, trustee; and Peter J. Little, Esq., for the Second National Bank of New Haven.

By Mr. Doerr:

The record shows the assignment of the United States National Bank of Johnstown to the United States National Bank in Johnstown was filed with the Referee as of November 20, 1943.

OFFERS IN EVIDENCE

By Mr. Stineman:

The First National Bank of South Fork offers in evidence the original claim showing its security as a judgment creditor.

[fol. 52] By Mr. Doerr;

We want to offer the entire record in this case, Mr. Referee, but we also then offer specifically those portions of the record that pertain to the creditors in question from time to time. First of all, we offer proof of secured debt of the Equitable Trust Company of New York, a corporation incorporated under the laws of the State of New York, filed June 29, 1926, and having thereunto attached letter of attorney to P. J. Little, Esq. to represent them in that claim.

By Mr. Farley:

I object to the offer, your Honor, on the ground it is not within any of the issues raised by the petition of the Johnstown bank under which the order of August 24, 1944, was granted. It is improper at this proceeding by the Johnstown Bank in that it is not within any of the issues raised by the petition, but is an issue in a petition heretofore filed on which an appeal was taken and rendered in favor of the Chase Bank by the District Court. It is no more than a rehashing of what has gone on many years previously, and which is completely on the present record. I further object to the offer with respect to the letter which is attempted to be offered now in evidence from attorneys to P. J. Little in 1926, at the time that that proof of claim was filed by the Chase National Bank, that that letter is a confidential communication between attorney and client, and a private communication should not be received in evidence. Where that letter came from I don't know, but any attorney that represents a client has no right to submit, without the consent of that client, any letter that he received from that client.

[fol. 53] By Mr. Doerr:

We are not offering any letter. We are offering the authority of Peter J. Little to represent the bank.

By Mr. Farley:

The offer, as I understood, was the proof of a secured debt, together with a letter to B. J. Little.

By the Referee:

Letter of attorney.

By Mr. Farley:

I object to the offer on the ground that all that matter was before the Court, and was a complete part of the record. If there is any objection to the record, that objection should have been previously taken by the United States National Bank of Johnstown.

By Mr. Doerr:

Your claim wouldn't be filed if that was out.

By the Referee:

The objection is overruled.

By Mr. Farley:

In fairness to Mr. Little, I withdraw any objection that may have been made to the offer of the letter. I find out now that is a duly executed power of attorney.

By Mr. Widmann:

Can we stipulate that the Chase National Bank is successor in trust by merger to the Equitable Trust Company of New York as of June 30, 1930?

By Mr. Doerr:

If the Court please, I would like to make a correction. I find from the record that the assignment of the United States National Bank of Johnstown is dated as having been made on November 30, 1942, whereas the pleading we filed was 1941, the same date. I would like to correct that.

[fol. 54] By Mr. Farley:

In the interest of expediting and facilitating this matter, I think there are many things we can stipulate without offering any of these claims.

By Mr. Widmann:

Is it stipulated that the claim of the United States National Bank of Johnstown was assigned to the United States National Bank in Johnstown by an assignment dated October 28, 1942, but in fact the assignment was purchased in December, 1941?

By Mr. Farley:

Of course, I don't know anything about the background of that. I don't think the question was raised when the matter was before your Honor the last time. For the sake of this record I think we can stipulate that without waiving any right we may have.

By Mr. Widmann:

Mr. Farley, can it be stipulated that Arthur John Keefe was attorney for the Equitable Trust Company and the Chase National Bank up to (interrupted).

By Mr. Farley:

Mr. Keefe was present at the meeting of December 31, 1929. Mr. Keefe was an associate of Murray, Aldrich and Webb at that time.

By Mr. Widmann:

We might further stipulate that Mr. Keefe was present on March 9th and May 2, 1934, as counsel for the Chase National Bank.

By Mr. Farley:

I will so stipulate subject to check to save time.

By Mr. Farley:

That was when?

[fol. 55] By Mr. Widmann:

March 9th, and May 2, 1934.

By Mr. Doerr:

It appears from the record that at the meeting held December 31, 1929, Peter J. Little appeared for the Equitable Trust Company of New York, and at the meet-

ing held March 4, 1932, Peter J. Little appeared for the Chase National Bank, and also on May 4, 1933.

By Mr. Farley:

With respect to the meeting of December 31, 1929, and the subsequent meetings referred to, Mr. Peter J. Little was representing in a limited capacity the Equitable Trust Company and its successor, the Chase National Bank of the City of New York; and so there will be no dispute on the record, it should be noted at that time Mr. Little was counsel for the trustee, Lester Larimer.

By Mr. Doerr:

That is right, he was.

By Mr. Doerr:

For the purpose of showing the authority of Mr. Little in respect to what Mr. Farley just stated, we offer the record, and it is subject then to his ability to contradict the record if he can.

By Mr. Farley:

The burden is upon you, you instigated this proceeding.

By Mr. Doerr:

We offer the record for that purpose.

By Mr. Farley:

I would like to know what part of the record at the meeting held before the Referee on the 31st day of December, 1929?

[fol. 56] By Mr. Doerr:

We offer the record for the purpose of showing that Peter J. Little, Esq. appeared for. (interrupted).

By the Referee:

Hasn't that all been admitted subject to check.

By Mr. Widmann:

We withdraw that.

By Mr. Doerr:

We also offer the following as being present at the meeting on December 31, 1929: Harry Doerr, Esq.; P. J. Little, Esq.; Arthur John Keefe, Esq.; George L. Reade, of Reade & Reade; F. C. Martin; Lester Larimer, trustee; W. I. Stineman, President of the First National Bank of South Fork, Pa. We specifically want to offer the following stipulation made by Mr. Little at that meeting of December 31, 1929; "By Mr. Little: It was at the suggestion of myself, I think, (interrupted).

By Mr. Farley:

I don't want to interrupt unnecessarily, but isn't that a matter of record? That was before the District Court and this Court.

By Mr. Widmann:

It was not before the District Court in briefs.

By Mr. Farley:

The opinion of Referee Myers on the petition of the Chase National Bank contains in toto the statement that you are about to read on page one of the testimony taken on December 31, 1929. The opinion of Referee Myers was before the District Court when the record was before the District Court.

By Mr. Doerr:

That was in his opinion, but we are going to put it on the record.

[fol. 57] By Mr. Little: It was at the suggestion of myself, I think, that the order was made to pay this money to the first judgment creditor, with the thought that the two judgments which were liens on real estate being out of the way, we would have a clear sailing for prorated dividends thereafter. My clients, after the suggestion was made, decided that they could not acquiesce in the suggestion, and requested me to file exceptions, which I was obliged to do. After discussing this with Mr. Keefe, and going over the matter generally, and after examining two of the leases from which the royalties were obtained in order to make up part of the fund for distribution, we suggested that under the law the estate

should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors."

By Mr. Farley:

In order that there will be no misunderstanding, I will stipulate that the statement read by Mr. Doerr appears in the testimony taken on December 31, 1929. I do object to the characterization of the statement by Mr. Doerr as being a stipulation and without waiving any rights that I may have, or the Chase National Bank of the City of New York may have, as to the question of the authority of Mr. Little to enter into such stipulation or statement.

By Mr. Doerr:

In order that the Court may be informed and understand what Mr. Little's statement referred to when he says it was at the suggestion of myself, I think, that the [fol. 58] order was made to pay this money to the first judgment creditor, I want to offer testimony taken before the Referee on November 18, 1929, in which the following note appears: "The Attorney for the Trustee asked that the balance of the fund in the hands of the Trustee as shown by his last account after payment of costs be awarded to the United States National Bank of Johnstown, Pa., as first lienor."

By Mr. Farley:

I move that that be stricken from the record on the ground that this is nothing more than argument and doesn't in any way relate to any matters which are before this Court pursuant to the order of the District Court on August 24th of this year.

By the Referee:

The objection is overruled.

By Mr. Doerr:

We would like to read from a meeting before the Referee on May 4, 1933. "Appearances: P. J. Little, Esq.,

appears for Chase National Bank, (formerly Equitable Trust Company) and Second National Bank of New Haven; Lester Larimer, Trustee, for himself; Ray Patton Smith, Esq., appears for First National Bank of South Fork; Harry Doerr, Esq., appears for the U. S. National Bank of Johnstown; and George L. Reade, Esq., appears for Shearson, Hammill Company. We would like to read this into the record, a statement by Mr. Little: "The interest of the Harvey C. Stineman Estate being one-sixth of the interest of the Jacob C. Stineman Estate, and the United States National Bank being the first lien creditor, it is hereby agreed that an estimate of the amount due the United States National Bank out of moneys from sales of real estate on which their judgment is a first lien, at the [fol. 59] present time, amounts to approximately $1820.65. That all costs of administration are calculated at approximately $182.00 (these amounts to be carried into a final adjustment by the Referee in order to secure accuracy), it is hereby agreed that the sum of $1638.65 be appropriated to the United States National Bank of Johnstown out of the funds now in the hands of the Trustee, there being no exceptions to the allowance of distribution to the said bank out of the sale of real estate on which the judgment is a lien. And now, May 4th 1933, I hereby withdraw all exceptions filed by me as attorney for Chase National Bank and Second National Bank of New Haven, Connecticut, to the allowance of the claim of Shearson, Hammill Company."

By Mr. Farley:

I would like to make a general objection to all this line of testimony on the ground that it is in the nature of reargument of the petition of the Chase National Bank and a rehashing of what took place and what has been determined years before, all of which was before this Court on the petition of the Chase National Bank and before the District Court on the appeal by the Chase National Bank.

By Mr. Doerr:

We don't think it was very clear to the Court, and that is why we are clarifying this record.

By Mr. Farley:

If that is so, it was incumbent upon you to do so before it was certified by the Court.

By Mr. Doerr:

We now offer in evidence record of a distribution, being the first distribution of funds made by the Referee, and specifically with respect to the distribution [fol. 60] made to the United States National Bank of Johnstown out of real estate.

I withdraw the statement that it was real estate. It was personal property made November 15, 1935.

By Mr. Farley:

Without prejudice to my general objection, merely to expedite this matter, I will stipulate that the Johnstown bank received dividends arising from the general assets of the bankrupt estate on the sum of $13,685.00 on the following dates: November 27, 1935, $478.97; April 28, 1936, $600.90; February 21, 1938, $239.92; March 9, 1939, $174.62; April 22, 1940, $255.98; April 7, 1941, $354.74; March 16, 1942, $329.93; making a total of $2,435.06. That the Johnstown bank also received the following payments arising from the proceeds of the sale of real property of the bankrupt estate (interrupted).

By Mr. Stineman:

First National Bank of South Fork participates in the stipulation other than it wishes to make claim that the First National Bank of South Fork received no money from real estate.

By Mr. Farley:

I have referred to the Johnstown bank, and I will refer to the South Fork bank later.

May 24, 1933, $1,638.65. That was the first. Is that right?

By Mr. Widmann:

That is right. That was by agreement.

By Mr. Farley:

I move to strike that out. That is not part of my stipulation.

May 9, 1939, $516.66; April 22, 1940, $315.41; April 7, 1941, $464.36; March 16, 1942, $68.33.

[fol. 61] By Mr. Doerr:

Mr. Farley, will you stipulate also that the Chase National Bank has statements of all of these statements showing the distribution that you have just stipulated.

By Mr. Farley:

I will so stipulate that we received statements from the trustee, or if we don't have them in our present record, we knew they were available.

The last payment of March 16, 1942, in the amount of $68.33, was made representing proceeds of sale of real estate; and the $329.93, representing the dividend declared from the general assets of the estate, was paid to the United States National Bank in Johnstown as assignee of the United States National Bank of Johnstown; and so stipulating, I might say, that that matter was all brought to the attention of the Court when the petition of the Chase National Bank was first presented.

Hearing recessed until 1:00 P. M., October 10, 1944.

Afternoon Session

LESTER LARIMER, Trustee, called, sworn.

Direct examination.

By Mr. Widmann:

Q. You are the trustee in this bankrupt estate?

A. I am.

Q. Have you been trustee since the first meeting of creditors?

A. I have been.

Q. Are you familiar with the seven schedules of distribution that were handed down by the Referee?

A. Yes.

[fol. 62] Q. Did you make the distribution according to those schedules?

A. Yes, sir.

Q. Do you recall, Mr. Larimer, that there were seven distributions in which the United States National Bank

of Johnstown and later the United States National Bank in Johnstown were awarded money out of the general fund?

A. Yes.

Q. Were there some distributions in which this claim was awarded money out of the real estate fund?

A. Yes, sir.

Q. Were you present at all of the meetings of creditors in which (interrupted).

By Mr. Farley:

We object. It is not proper. The record speaks for itself.

By the Referee:

That would be right.

By Mr. Widmann:

Q. You were present at the meeting held on December 31, 1929?

By Mr. Farley:

I object.

By Mr. Widmann:

Q. Do you recall the stipulation or suggestion put on the record by Mr. Little at that meeting?

By Mr. Farley:

I object, it draws for a conclusion of the witness.

By Mr. Widmann:

I asked him if he had a recollection of the stipulation put on the record.

By the Referee:

Objection overruled.

[fol. 63] By Mr. Widmann:

Q. Do you have such a recollection, Mr. Larimer?

A. Yes, sir.

Q. Do you recall any conversations among the parties, the counsel who were present at that meeting, that lead up to Mr. Little making that statement on the record?

By Mr. Farley:

I object, your Honor, I think the question is entirely improper, and it calls for something which is not part of a judicial proceeding. It is not binding upon any of the creditors in this proceeding.

By the Referee:

He is asking whether he recalls any conversation. He is not asking what they were.

By Mr. Widmann:

I still think it would be material as to what they were. The Chase National Bank was a party when Mr. Little made the statement on the record.

By the Referee:

The objection is overruled.

By Mr. Widmann:

Q. Do you so recall?

A. I recall of the discussion. I don't know at what particular time, but I recall the incident.

Q. Do you recall the discussion among the creditors' counsel and the counsel for the Chase National Bank which brought about the scheme of distribution that was followed in this bankrupt proceeding?

By Mr. Farley:

I object. It assumes a state of facts which haven't been testified to. You asked him if the discussion had brought out this suggestion. There is nothing in the [fol. 64] record that any discussion had with any of the creditors brought up this statement on the record.

By Mr. Doerr:

There is an assumption there was such a thing. There was a stipulation. What brought it about?

By Mr. Widmann:

And particularly if the Chase National Bank participated in any discussions with the attorney for the trustee.

By the Referee:

The objection is overruled.

By Mr. Farley:

I object to the form of the question. It doesn't set a time or place.

By Mr. Widmann:

Q. Do you recall of any discussions among counsel for creditors, including counsel for the Chase National Bank, prior to the first distribution in 1935 that led to and brought about the scheme of distribution that has been followed in this case?

By Mr. Farley:

I object again on the grounds already stated.

By the Referee:

Objection overruled.

By the Witness:

A. Yes, I recall it.

By Mr. Widmann:

Q. What was that conversation, Mr. Larimer?

By Mr. Farley:

I object, your Honor. This is entirely improper.

By the Referee:

We feel this way, Mr. Farley. The whole question is [fol. 65] whether or not the Chase National Bank was a party to this plan for the distribution of the funds, so the preliminaries leading up to this plan would be pertinent and admissible in this proceeding, so we overrule the objection. That is, in which the Chase National Bank through counsel participated. We would not permit any preliminaries in which the Chase National Bank was not a party through their counsel.

By Mr. Widmann:

Q. What were those conversations?

By Mr. Farley:

I object to that. That is improper, your Honor, no parties have been identified, and no foundation has been laid.

By the Referee:

Yes, we think you should identify who were the parties, and who was there representing the bank.

By Mr. Doerr:

Q. Who was present and was discussing this matter, and why were they discussing it?

A. In the absence of the record, I am unable to say.

Q. Do you remember some of the lawyers who were there?

A. I remember my attorney was there.

Q. Who else?

A. I would want to look at the record.

Q. Do you remember who was there on December 31, 1929?

A. No, sir; not without looking at the record. The record ought to show that.

Q. We ask you to refresh your memory by looking at the record on that date?

By Mr. Farley:

Q. Would your memory be refreshed if you did look at the record?

A. It would state who were there.

[fol. 66] Q. Would that refresh your recollection as to who were there?

A. Yes.

By the Referee:

Here is the record.

By the Witness:

A. The record shows (interrupted).

By Mr. Doerr:

Q. Do you recollect the meeting?

A. Yes.

Q. Who were there? A. The record shows the following appearances: Harry Doerr, P. J. Little, Arthur John Keefe, George L. Reade, F. C. Martin, Lester Larimer, W. I. Stineman.

Q. That is the meeting at which Mr. Little put the stipulation on the record that you see right below here?

By Mr. Farley:

I object to the characterizing of that statement as a stipulation.

By Mr. Doerr:

Q. Do you remember what discussions among creditors led to that being put on the record and also the scheme of distribution that was followed what caused it?

By Mr. Farley:

I object to that, your Honor. First, it is calling for a conclusion of the witness. Secondly, this witness has testified that he doesn't remember those who took part in the discussions before that statement was placed on the record. And thirdly, the refreshing of his memory is only with respect who appeared at the meeting. It has nothing to do with the discussions that placed the statement on the record.

[fol. 67] By Mr. Doerr:

Q. Was that group that you named there?
A. I said the record showed the following appearances.
Q. Were they there, these people?
A. I think there is no doubt.

By Mr. Farley:

Q. Do you know?
A. No.

By Mr. Doerr:

Q. We will not ask you if you knew all of them there. Those that you do remember who were there at that meeting?

By Mr. Farley:

I object. He doesn't remember who was there.

By the Referee:

Objection overruled.

By the Witness:

A. From the record, I would state that every one was there.

By Mr. Farley:

Q. Do you know of your own knowledge whether every one was there?

A. No.

By Mr. Doerr:

Q. How many do you remember that were there at the time Mr. Little put that stipulation on the record?

By Mr. Farley:

I object to the characterization of the statement as a stipulation.

By Mr. Doerr:

Q. Mr. Larimer, just answer that question. How many do you remember were there?

By Mr. Farley:

I object, your Honor. This is just a repetition.

By the Referee:

Wouldn't the proper thing to do would be to [fol. 68] find out whether the representative of the Chase National Bank was there?

By Mr. Doerr:

That is a legal question. I would rather know who he saw there.

By Mr. Doerr:

Q. You know some that were there. Who were there?

A. Having confidence in the report of the Referee, I would say every one was there.

By Mr. Farley:

I move to strike out the answer of the witness.

By the Referee:

That may be stricken out.

By Mr. Doerr:

Q. Of your own knowledge do you know who was there?

A. I know I was there. I know my attorney was present.

Q. What other attorneys were there?

A. I can only speak from the record. The record shows Mr. Keefe was there.

By Mr. Farley:

I move to strike that out as not being responsive.

By the Referee:

That is right. Strike that out.

By Mr. Doerr:

We want the witness to testify from his own knowledge in addition to the record.

By Mr. Doerr:

Q. Our former question was: Do you know what led up to placing that on the record? What was the thought in mind of those when Mr. Little put that on the record?

[fol. 69] By Mr. Farley:

I object to that as not being proper.

By the Referee:

He could not testify as to their thought.

By Mr. Farley:

I object to that as no conversations have been proven.

By the Referee:

I would sustain Mr. Farley's objection unless Mr. Larimer can show that these people were present and that he took part, that he was there when the conversations took place leading onto this statement made by Mr. Little. He has to testify from his own recollection, not from this record. He says if the record is right, they were there. He does not assume any responsibility.

By Mr. Doerr:

Q. Who were present at the time that the conversations were had that led up to the placing of that statement on the record by Mr. Little?

By Mr. Farley:

I object to that on the grounds already stated, and on the ground that this witness has already testified he does not know who was present.

By the Referee:

We overrule the objection.

By the Witness:

A. The attorney for the trustee, P. J. Little, John—Arthur John Keefe. That is all I could be sure of.

By Mr. Doerr:

Q. What was the nature of the conversations? Why did they make that statement? What was the reason?

[fol. 70] By Mr. Farley:

Objected to, it calls for a conclusion of the witness.

By the Referee:

We sustain the objection.

By Mr. Doerr:

Q. Mr. Larimer, you made the distributions in this case, and you issued the checks, did you not?

A. I did.

Q. Why did you make the distributions as you made them?

By Mr. Farley:

I object. I think this is all part of the record.

By the Referee:

Objection overruled. We will permit the question.

By the Witness:

A. I did so according to the order of the Referee.

By Mr. Doerr:

Q. Do you know now why and how that scheme of distribution was arrived at? What was the reason for it?

By Mr. Farley:

I object, your Honor. He has already testified why he made the distributions the way he did, and for the reasons stated in my previous objections, it calls for a conclusion of the witness, and it is all a matter of record.

By the Referee:

We will hear it. The objection is overruled.

By the Witness:

A. There were two judgment creditors, the United States National Bank of Johnstown and the First National Bank of South Fork, they were pressing for their money, and in order to satisfy or quiet (interrupted)

[fol. 71] By Mr. Farley:

I object to this testimony, first, as not being responsive; second, he still hasn't laid a foundation for any such answer.

By Mr. Doerr:

He is trying to give you the reason.

By the Referee:

He did say Mr. Keefe was there, and he was there, and the attorney for the trustee was there. We think he did say that. We are going to permit him to put this on the record. The objection is overruled.

(Stenographer reads the witness's answer as follows:) A. There were two judgment creditors, the United States National Bank of Johnstown and the First National Bank of South Fork, they were pressing for their money, and in order to satisfy or quiet (witness continues) them or stop them from proceeding to collect, and after discussion the agreement or statement which was put on the record by Mr. Little was agreed to.

By Mr. Farley:

I object again, as not being responsive, and second, it is a conclusion of the witness. He hasn't established that anybody took part in any conversation. As a matter of fact, he didn't even say a conversation took place.

By the Referee:

We overrule the objection.

Cross-examination.

By Mr. Farley:

Q. Where did this conversation take place? You say there was a conversation.

A. Yes.

[fol. 72] Q. Where did it take place?
A. Most of it in the office of the Referee.
Q. And do you remember Mr. Keefe being there?
A. Yes, sir.
Q. What was the date of the conversation?
A. The record shows December 31, 1929.

By Mr. Farley:

I move to strike out the answer as not being responsive. He says the record shows.

By the Referee:

The motion to strike out is denied.

By Mr. Farley:

Q. Now, you testified as to the distributions that you made, and you also testified, or you know that this statement appears on the record. Now, was that statement approved by what creditors?
A. The statement of P. J. Little, do you mean?
Q. That is right.
A. My recollection is that it was approved by every creditor.
Q. Was every creditor present at that meeting?
A. No, sir.
Q. Was any notice sent to the creditors after that statement was placed on the record advising them of that statement?

By Mr. Widmann:

It is objected to for the reason that the Chase National Bank is the only creditor that is in objection, objecting to the scheme of distribution, and counsel should not be concerned with any creditors outside of his own.

By the Witness:

A. No.

[fol. 73] By Mr Farley:

Q. Did the Johnstown bank at any time after that statement was made, ask or seek to have the real property sold?
A. Not to my recollection.

Q. You made a motion to that effect, did you not, in 1942?

By Mr. Widmann:

We object to that for two reasons. In the first place, it is not cross-examination; and in the second place, it is incompetent and immaterial.

By Mr. Farley:

I will withdraw my question, and will have no further questions.

By the Referee:

Is there anything further?
(No response).

TESTIMONY CLOSES

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 74] POWER OF ATTORNEY

To P. J. Little, Esq.,
Ebensburg, Pa.

The undersigned corporation, of the City of New York, State of New York, a creditor of the above named bankrupt, does hereby authorize you to attend the meeting or meetings of the creditors of the bankrupt aforesaid, at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings or any adjournment or adjournments thereof, may be held; and, then and there, from time to time, and as often as there may be occasion, for said corporation creditor, and in its name, to vote in the choice of trustee or trustees of the estate of the said bankrupt, and for it to assent to such appointment of trustee or trustees; and with like power to attend and vote and assent at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held herein for the purpose aforesaid; with full power of substitution.

In witness whereof, this instrument is signed and the seal of said corporation affixed hereto this 28 day of June, A.D. 1926.

The Equitable Trust Company of New York, By (Sgd.) E. J. Quintal, Vice-President.

Attest:
[SEAL] (Sgd.) W. J. Eck, Sect'y.
(Acknowledged June 28, 1926)

[fol. 75] In United States District Court

Opinion

Gibson, District Judge.

On August 3, 1944, this court sustained exceptions of the Chase National Bank of the City of New York to orders of the Referee in above entitled cause. By those orders the Referee had held that the United States National Bank of Johnstown and the First National Bank of South Fork were entitled to maintain their positions as lien creditors of the bankrupt and at the same time participate in the distribution of the general fund. The orders had been made pursuant to the prior consent of all general creditors, it was claimed. In fact it was asserted that the arrangement had been instituted at the suggestion of counsel for the Chase National Bank on behalf of all general creditors. The court, feeling that participation in the two funds was contrary to all accepted bankruptcy practice, and that the record then before it did not establish the active consent of counsel for the Chase National Bank to such participation, vacated the Referee's orders.

In its memorandum explaining its action, however, the court said:

> "If it were definitely established that the Chase National Bank had full knowledge of the agreement claimed and had benefited as a result of it, and had induced it in fact, this court, despite some qualms induced by the Bankruptcy Act, might well hold that it could not in good faith now attack it. The record, however, is largely in the Referee's Office,

but such of it as is before the court does not make it plain that the Chase National Bank or its counsel had the definite understanding claimed."

[fol. 76] After the order sustaining exceptions to the Referee's orders was made, counsel for the United States National Bank of Johnstown and the First National Bank of South Fork sought a rehearing upon the matter which was granted, and the entire record was produced. From it the court is definitely satisfied that counsel for the Chase National Bank had recommended and had full knowledge of the agreement of the general creditors that the lien holders, in return for their ceasing to attempt to realize upon their liens, should participate in both the judgment creditor and general funds. This agreement was of great benefit to the general creditors. Had the secured creditors realized upon their liens, a sufficient amount would have been obtained to satisfy them, but the effect of it would have been almost the total wreck of the general claims. When this fact is joined to the influence of counsel for the Chase National Bank in promoting the participation agreement, and the further fact that that Bank, without any demur whatsoever, had knowledge of some seven distributions, prior to its exceptions to the Referee's orders, wherein the lien holders had received all the amounts distributed from the realty fund and had participated in the general fund, it would seem plain that the Chase National Bank is equitably estopped from relying upon a contention which has become entirely technical, strong as its position might have been under other circumstances.

The orders of this court of August 3, 1944, by which the exceptions of the Chase National Bank were sustained and the Referee's order of June 7, 1943, was vacated and set aside, will be vacated and the Referee's order re-established.

[fol. 77] IN UNITED STATES DISTRICT COURT

STIPULATION AND DESIGNATION OF RECORD—
Filed August 8, 1945

It is hereby stipulated and agreed by and between the undersigned that the record on appeal taken by The Chase National Bank of the City of New York in the above entitled proceeding shall consist of the following:

1. Notice of appeal.

2. Order of June 20, 1945.

3. Notice of motion and petition of the Chase National Bank, verified October 9, 1942, with respect to the United States National Bank of Johnstown's claim.

4. Notice of motion and petition of the Chase National Bank, verified October 30, 1942, with respect to the First National Bank of South Fork's claim.

5. Answer of the United States National Bank of Johnstown to the petition of The Chase National Bank of the City of New York.

6. Opinion of Referee C. R. Myers dated June 7, 1943.

7. Orders (dated June 7, 1943 of Referee C. R. Myers.

8. Petitions (2) of The Chase National Bank of the City of New York, verified June 15, 1943, to review the orders of Referee C. R. Myers.

9. Petition of United States National Bank of Johnstown dated June 16, 1943.

10. Opinion of District Judge Gibson on petitions of The Chase National Bank of the City of New York [fol. 78] to review the orders of Referee C. R. Myers dated June 7, 1943.

11. Orders (2) dated August 3, 1944.

12. Petition of United States National Bank of Johnstown for reargument.

13. Order of District Judge Gibson dated August 24, 1944 granting reargument.

14. Stenographic transcript of testimony taken before Referee C. R. Myers on October 10, 1944.

15. Power of attorney executed by the Equitable Trust Company to P. J. Little, dated June 28, 1926.

16. Opinion of District Judge Gibson rendered after the rehearing.

Dated: New York, N. Y., July 31, 1945.

John G. Buchanan, Smith, Buchanan & Ingersoll, Milbank, Tweed & Hope, Attorneys for The Chase National Bank of the City of New York. Harry Doerr, Attorney for United States National Bank of Johnstown. Harry Doerr, Attorney for First National Bank of South Fork.

[fol. 79] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9012

In the Matter of HARVEY C. STINEMAN, Bankrupt

Appeal of THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

Appeal from Order of the District Court of the United States for the Western District of Pennsylvania

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Argued January 24, 1946

Before BIGGS, GOODRICH and O'CONNELL, Circuit Judges

OPINION OF THE COURT—Filed May 7, 1946

By BIGGS, Circuit Judge.

The appeal at bar presents an anomaly in the administration of the Bankruptcy Act. The facts are as follows. On June 10, 1926 Harvey C. Stineman was adjudicated a bankrupt upon a voluntary petition and the case was referred to a referee. Among the principal assets of the estate was an undivided one-sixth interest in a large acreage

of valuable coal lands. Some of these lands were being mined by lessees and were producing substantial royalties. The value of the interest of the bankrupt estate in the realty was appraised at $90,000. United States National [fol. 80] Bank *of*[1] Johnstown and First National Bank of South Fork had procured judgments which were, respectively first and second liens on the bankrupt's interest in these coal lands.

General claims filed against the estate amount to about $225,000. Included among these is the claim of the appellant, Chase National Bank of the City of New York as successor to Equitable Trust Company.[2] Chase's claim as a general creditor was allowed on May 14, 1935 in the amount of $55,231.98. This represented a reduction of the bank's original claim which had been secured in part by collateral given by the bankrupt. The reduction was ordered by the referee upon exceptions filed to Chase's claim by National Bank of Johnstown and South Fork Bank. On January 8, 1927 National Bank of Johnstown filed a secured claim in the amount of $10,000, reciting as its security the lien of the judgment hereinbefore referred to. Thereafter, on July 14, 1932, it filed another claim designated by it as an "Amended Liquidated Claim" for $13,685 including interest. The latter claim contains no recital of any security and appears to be a general claim intended to take the place of the original secured claim. On August 3, 1944 an order was entered by Judge Gibson, affirming an order of the referee which reduced National Bank of Johnstown's claim to $10,000. On June 29, 1926 South Fork Bank filed a claim in the amount of $18,463.45. It recited the security of the judgments against the bankrupt. We omit any discussion as to whether this claim was timely filed since it is presently unnecessary to resolve that question.

On December 31, 1929, approximately three and a half years after the adjudication, an important meeting of

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[1] The word "of" is emphasized in this opinion in order to distinguish this institution from its successor banking corporation, United States National Bank *in* Johnstown.

[2] We will refer to the claim hereafter in the opinion as if at all times it had belonged to Chase.

creditors was held by the referee. What transpired at this meeting is far from clear from the record offered to this court. It would appear, however, that P. J. Little, Esquire, [fol. 81] at that time was serving as counsel for Chase and other creditors as well as counsel for the trustee in bankruptcy.[3] Chase was represented also by another counsel, Arthur John Keefe, Esquire; a member of the bar of New York. The trustee was present, as was the bankrupt and certain of the general creditors. It was believed that if National Bank of Johnstown and South Fork Bank foreclosed on their liens, little, if anything, would be left for the general creditors. Mr. Little suggested that the estate "be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors". Whether the referee ever made an order in support of this division is not clear. In any event the estate was administered as if an order supporting the division of the estate into the "two items" had been made. National Bank of Johnstown and South Fork Bank assenting to the course followed and forebearing to realize on their liens.

The trustee in bankruptcy presently insists that what Mr. Little stated at the meeting of December 31, 1929 was prompted by Chase and amounted to a stipulation by Chase agreeing to the proposed division. It is not clear why the trustee should take the position that Mr. Little was making the proposal for Chase rather than on behalf of the trustee himself or of the other creditors, i.e. Hartwell and Lester, Second National Bank of New Haven and Lester Coal Company, which he also represented. Mr. Keefe who did represent Chase was present. Apparently he did not protest the proposed division. The trustee contends that Chase by this lack of protest and by its subsequent actions, which will be referred to at a later point in this opinion, is estopped from asserting that National Bank in Johnstown and South Fork

[3] Later, Mr. Little, becoming aware of the conflict of interests, ceased to represent Chase.

Bank are not entitled to be paid as secured creditors. [fol. 82] Precisely what National Bank of Johnstown or its successor, National Bank in Johnstown, received from the income from the real estates is not clear but it does appear that it was paid at least $1364.76. It is clear that National Bank of Johnstown and National Bank in Johnstown received seven dividends from the general estate paid between November 27, 1935 and March 16, 1942, or a total of $2435.06.[4] South Fork Bank also received dividends under the seven schedules of distribution filed by the referee but the amounts received by this bank do not appear in the record. Apparently, South Fork Bank received no money from the real estate of the bankrupt.

Section 65 (a) of the Bankruptcy Act provides, "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."[5] Section 57(h) of the act provides, "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance . . . ."[6]

It is fundamental that the value of securities held by creditors must be valued before they may participate in distributions from the general estate and dividends may be paid only on the unpaid balances. In re Rogers, 20 F. Supp. 120, 133. Cf. Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, 477; see also Hiscock v. Varick Bank of N. Y., 206 U. S. 28, 40. The dividends paid to National Bank of Johnstown, to its successor and to South Fork Bank were not paid pro rata upon the

[4] See appendix pp. 58a-60a.

[5] The section quoted appeared in the Act of 1898, 30 Stat. 563, and has remained unchanged. See 11 U.S.C.A. § 105(a).

[6] This language which appeared in the 1898 act has also remained unchanged. 30 Stat. 560. See 11 U.S.C.A. § 93(h).

[fol. 83] balance of the respective claims after the values of the judgment liens were deducted. No deductions were ever made. As to this fact all parties agree. The participants in the bankruptcy proceeding simply ignored the pertinent provisions of the Bankruptcy Act. It is asserted that this resulted in a substantial benefit to the general creditors but we cannot test the accuracy of this assertion from the present record. National Bank of Johnstown and South Fork Bank in their brief state: "As the result of the lien creditors foregoing a forced sale of the real estate, a large amount in royalties was received by the Trustee; and distributed to general creditors, as is evidenced by the seven dividends." We will assume for the purposes of this opinion that royalties from the coal lands were received into the fund for the general creditors: viz, into Mr. Little's second "item", and that seven dividends could be paid because of the receipt of royalties into the general creditors' fund. This result, however, cannot justify the course of the administration in the case at bar. The course pursued was not only without statutory justification but, as we have indicated, probably was unnecessary for the reasons set out in the next paragraph.

If, as National Bank in Johnstown and South Fork Bank presently assert, the appraisal of Stineman's interest in the coal lands was $90,000, the trustee would have been justified in paying off the liens by money borrowed upon trustee's certificates; or, the general creditors could have effected a composition under Section 74 of the Bankruptcy Act, 11 U.S.C.A. § 30; or, in any event, National Bank of Johnstown and South Fork Bank could have availed themselves of the provisions of Section 57(h), hereinbefore quoted, and could have had the value of their respective securities ascertained and credited against their claims in order that they might receive dividends from the general estate upon the balances. The trustee seems to have concluded that the banks could have foreclosed their liens but this was not the case. They had filed their claims in the bankruptcy court and were [fol. 84] subject to the jurisdiction of that tribunal. The equity of the general estate in the coal lands was substantial. Stineman's interest in them could have been sold under order of the referee, free and clear of all

liens and encumbrances, the liens and encumbrances to attach to the proceeds of the sale, or Stineman's interest could have been sold subject to the liens. In any event a substantial fund should have been created for the benefit of the general creditors. How much has been created for the general estate by the course pursued by the referee and trustee cannot be determined on the very incomplete transcript offered to us. From the dividends paid to National Bank of Johnstown or National Bank in Johnstown we may surmise that general creditors have received about 15 cents on the dollar by reason of the seven dividends already paid. But we do not know what assets remain in the general estate. In view of the deficiencies of the record further speculation would be futile.

The parties have demonstrated, as we have indicated, a complete disregard for the pertinent provisions of the Bankruptcy Act. Those provisions were not intended by Congress to apply only to certain individuals or under certain circumstances. Congress intended the provisions of the Act to be of universal application and to establish principles which Congress deemed necessary for the public good. The participants in Stineman's bankruptcy proceeding were bound by the law. National Bank in Johnstown and South Fork Bank may not receive the benefits of their securities and also be treated as general creditors to the full extent of their claims. They may not have the benefit of both positions and the liabilities and obligations of neither. Under the law an attempt to assert an estoppel against Chase or any other creditor which would effect such a result is futile.[7]

[fol. 85] Since National Bank of Johnstown and National Bank in Johnstown and South Fork Bank have received dividends from the general estate to the full extent

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[7] For example, if the trustee in bankruptcy, the banks named and all other creditors had entered into a covenant under seal to administer the estate in such a way that the secured creditors might retain their securities while sharing pro rata in the general estate on the face amount of their claims, such a covenant would have been void as against the public policy expressed by Congress in the Bankruptcy Act.

of their claims as allowed without having the value of their securities ascertained or deducted as provided by law they must be deemed to have elected to be treated as general creditors and to have waived their rights to the security of their judgment liens. See In re O'Gara, 12 F. 2d 126, cert. den. 271 U. S. 683 and the cases cited therein; Coggin v. Hartford Accident & Indemnity Co., 9 F. Supp. 785. It follows that since the receipt of the first dividend from the general estate, paid on January 27, 1935, National Bank of Johnstown and South Fork Bank became entitled to share in the bankruptcy estate only as general creditors. The order of the court below, from which Chase has appealed, effected the contrary result.* Consequently, it must be reversed.

It does not appear from the record filed in this court precisely what is the relationship existing between National Bank in Johnstown and its predecessor, National Bank of Johnstown. If the former assumed the obligations of the latter, National Bank in Johnstown is liable for, and should be compelled to refund to the trustee, the sums of money gotten by it from the real estate unless the amounts to be received by the bank by way of future dividends from the general estate will be sufficient to afford a set-off. If National Bank in Johnstown did not assume the liabilities of National Bank of Johnstown, and future dividends to be received by the former will be insufficient to afford a set-off, National Bank of Johnstown or its representatives should be held to an accounting as the circumstances and the law will warrant. In view of the incomplete and chaotic record before us it would be futile to discuss this subject further in this opinion.

[fol. 86] In conclusion we point out that the case at bar is just short of twenty years old. The proceedings should be terminated as rapidly as possible.

The order appealed from will be reversed and the cause will be remanded with directions to proceed in accordance with this opinion.

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*See In re Stineman, 61 F. Supp. 151, reversing 56 F. Supp. 190. It should be observed that the earlier decision of the District Court was in accord with our opinion.

DISSENTING OPINION.

O'CONNELL, Circuit Judge, dissenting.

I cannot agree with the conclusions reached by the majority. What was here done was at the request of the general creditors, or at least the principal general creditor (the appellant), with the knowledge and approval of the trustee. It was motivated by a desire on the part of the secured creditors (the appellees) to cooperate in working out a plan of liquidation which the trustees and representatives of the general estate believed would realize to the fullest extent on the assets of the bankrupt. After approximately twenty years application of the terms of the participation agreement, promoted at its instance and for its express benefit, the appellant now seeks to repudiate it.

The record discloses that the banks in their claims set forth the nature of the security held by them. The value of the interest of the bankrupt's estate in the coal lands was appraised at $90,000. The claim of the National Bank of Johnstown was but $10,000; that of the First National Bank of South Fork, $18,463.45. These claims were secured by first and second liens respectively on the bankrupt's interest in the aforesaid coal lands. If the appraisal was accurate, and the majority finds, "The equity of the general estate in the coal lands was substantial," the claims were fully protected in their entirety, and it was the acknowledgment of this fact by all that led to the participation agreement whereby the secured creditors also shared in the dividends from the general estate. Must the receipt of dividends by the secured creditors under such circumstances compel the conclusion under applicable law that the National Bank of Johnstown and the First National Bank of South Fork have [fol. 87] waived their rights to the security of their judgment liens and have elected to be treated as general creditors? I do not think so.

I believe sanction may be found for the action of the parties in the second clause of Section 57(h) of the Act, which provides, "The value of securities held by secured creditors shall be determined . . . . by such creditors and the trustee by agreement, arbitration, compromise or litigation. . . ." The net result of what was here accom-

plished was the determination of the value of securities held by the banks to be the amount of their claims, the parties providing the means by which said amounts would be liquidated. "Among the modes of evaluation to which the bankruptcy court may resort, evaluation by means of an agreement between the creditor and the trustee is the most desirable"; 3 Collier on Bankruptcy (14th ed.) 282. In this, the general estate was not harmed, but rather benefited.

The nature of the asset against which the security attached must be borne in mind. Every ton of coal mined reduced the equity of the lien creditors. This is not a case of a pledgee in possession who may close out his security when the pledgee is free to choose his time to sell or where the lienor may liquidate his security under his agreement with the debtor. True it is that once a petition in bankruptcy is filed, the holder of a lien on the property in the custody of the court may not foreclose without permission of the bankruptcy court, but were such authority sought the court would be guided by what under the circumstances appeared to be in the best interest of all the parties concerned. True also, the trustee might have liquidated the claims of the judgment creditors by various other means, but, obviously, the banks would not have objected to such methods had the trustee or the creditors indicated a desire so to do. By the method adopted, the parties concerned crystallized the best interests of all by an actual conversion into money of the assets in the hands of the trustee against which the lien attached.

[fol. 88] The equity in the coal property being admittedly greater than the liens of the judgment creditors, shall we say then that such judgment creditors must stand idly by until all the coal is mined except enough to cover secured claims? Or, under their security, are the lien creditors entitled to all the royalties received from the coal lands until their claims are paid in full?

As to such royalties, the effect of the agreement here was not that of the secured creditors receiving dividends with the general creditors on any balance over and above their securities, but rather of the general creditors receiving a dividend upon their claims out of the security held by the judgment creditors before such secured claims

were paid in full. The sharing by the secured creditors in the dividends paid from the general estate was not intended by any of the parties to put the secured creditors in position to receive payment of more than the value of their security, but rather to more speedily pay off the secured claims.[1] I cannot find in such action, to the disadvantage of the secured creditors, adopted for the benefit of the general estate, a waiver by the secured creditors of their rights to the security of their judgment liens. "Acts relied on as a waiver or a release must either be done with intent to waive or to release or else they must be such as might reasonably have led, and in point of fact did lead, other persons to act to their hurt upon the assumption that the waiver or release had been made": Maxwell v. McDaniels, 195 Fed. 426, 429 (C.C.A. 4, 1912). Bankruptcy courts are not powerless to act when equity and good conscience dictate the determination of equitable relief: Hutchinson v. Otis, 115 Fed. 937 (C.C.A. 1, 1902), affirmed 190 U. S. 552. The filing of a general claim, although allowed and dividends paid thereon, does not estop a creditor from afterwards claiming his right to preferential payment where no injury to another is shown: Wuerpel v. Commercial Germania Trust & Savings Bank, 238 Fed. 269 (C.C.A. 5, 1916). A waiver of rights will only be construed where the conduct of the [fol. 89] claimant clearly evidences his intention so to elect. Thomas v. Taggart, 209 U. S. 385 (1908); In re Kaplan & Myers, 241 Fed. 459 (C.C.A. 3, 1917).

I am unable, therefore, to agree with the majority that the appellees made a final election to share in the bankrupt estate only as general creditors when they agreed to the suggestion of the appellant. This case having been in litigation for approximately twenty years, I agree with the suggestion made by the majority that these proceedings be terminated as rapidly as possible. The record should be returned so that the appellees might in the light of the changed attitude of the appellant elect their remedy,

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[1] Both the United States National Bank of Johnstown and the First National Bank of South Fork have carefully revived their judgments during each five year period and in doing so made the trustee in bankruptcy in this estate a party to the proceedings.

with the subsequent adjustment in accounting that might result thereby, the winding up of the affairs of the bankrupt providing ample opportunity therefor.

[fol. 90] In the United States Circuit Court of Appeals, For the Third Circuit,

October Term, 1945

No. 9012

In the Matter of Harvey C. Steneman, Bankrupt

Appeal of The Chase National Bank of the City of New York

Judgment—May 7, 1946

Present: Biggs, Goodrich and O'Connell, Circuit Judges.

On appeal from the District Court of the United States, for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Order of June 20, 1945 of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause is remanded with directions to proceed in accordance with the opinion of this court.

By the Court, Biggs, Circuit Judge.

May 7, 1946

[File endorsement omitted.]

[fol. 91] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 92] SUPREME COURT OF THE UNITED STATES,

October Term, 1946

No. 371

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 51,285, U. S. Circuit Court of Appeals, Third Circuit, Term No. 371. United States National Bank in Johnstown and First National Bank of South Fork, Petitioners, vs. Chase National Bank of the City of New York and Lester Larimer, Trustee. Petition for a writ of certiorari and exhibit thereto. Filed August 6, 1946. Term No. 371 O.T. 1946.

(7523)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 371

UNITED STATES NATIONAL BANK IN JOHNSTOWN and FIRST NATIONAL BANK OF SOUTH FORK,

Petitioners,

vs.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK and LESTER LARIMER, Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT L. ROSSER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 371

UNITED STATES NATIONAL BANK IN JOHNSTOWN AND FIRST NATIONAL BANK OF SOUTH FORK, *Petitioners,*

vs.,

CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND LESTER LARIMER, TRUSTEE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit (R. 79-86), which reverses an order of the United States District Court for the Western District of Pennsylvania which sustained the order of the Referee holding that the United States National Bank of Johnstown and the First National Bank of South Fork were entitled to maintain their position as lien credi-

tors against the estate of Harvey C. Stineman, bankrupt (R. 75-76).

The respondents are the Chase National Bank of the City of New York, and Lester Larimer, ' tee in bankruptcy for the estate of Harvey C. Stineman.

Statement

On June 10, 1926, Harvey C. Stineman was adjudicated a bankrupt upon a voluntary petition in bankruptcy and the case was referred to a referee. The principal asset of the bankrupt estate was an undivided one-sixth interest in a large acreage of valuable coal lands, a considerable portion of which was being operated by lessees and producing substantial royalties. The value of the interest of the said bankrupt estate in and to said asset was appraised and fixed in the amount of $90,000.00.

At the date the petition was filed and of adjudication, the United States National Bank of Johnstown, and the First National Bank of South Fork, were respectively, first and second judgment lien creditors, having procured judgments against the bankrupt, Harvey C. Stineman, more than four months prior to the time the petition was filed and the date of adjudication. The said real estate had no other incumbrances upon it.

The United States National Bank of Johnstown is a corporation created under and by virtue of the laws of the United States, and carrying on business in the City of Johnstown, State of Pennsylvania. The First National Bank of South Fork is a corporation created under and by virtue of the laws of the State of Pennsylvania, and carrying on business at South Fork, Pennsylvania.

On January 8, 1927, the United States National Bank of Johnstown filed a secured claim in the bankruptcy proceedings for the amount of $10,000.00, and recited as its security

the lien of the judgment hereinabove referred to (R. 10-11). On June 29, 1926, the First National Bank of South Fork filed a secured claim with the referee for the sum of $18,463.45, and recited therein as its security, the judgments it had procured against the bankrupt (R. 19-20).

Chase National Bank of the City of New York (hereinafter referred to as "Chase Bank") is a general creditor herein, having filed its claim in the amount of $55,231.98 on May 14, 1935. This claim arose out of an indebtedness of the bankrupt to the Equitable Trust Company (to which the Chase Bank is the successor) originally in the amount of $94,000.00. Said indebtedness was evidenced by the bankrupt's demand collateral note, and after the sale of the collateral deposited by the bankrupt, the claim was originally filed in these proceedings in the amount of $74,153.00 on June 29, 1926. As exceptions to the allowance of this claim was filed, after hearing thereon, the claim was finally allowed for the amount of $55,231.98.

The total amount of unsecured claims, exclusive of the secured claims of the United States National Bank of Johnstown, and the First National Bank of South Fork, aggregate in the approximate amount of $225,000.00.

On December 31, 1929, an important meeting of creditors was held because the secured, or judgment lien creditors, were emphatically pressing for payment of their claims, and insisting upon their proceeding upon the security of their liens. This meeting was attended by the trustee, his attorney, counsel for the Chase Bank, the judgment lien creditors, the bankrupt, and many other creditors, and attorneys representing creditors. The practically unanimous consensus of opinion expressed by the trustee and creditors was that *"if the lien creditors foreclosed upon their liens, little, if anything, would be left for general creditors"* (R. 25). It was then proposed by Mr. Little,

attorney for the trustee and also for the Chase Bank, that *"the estate be divided into two items; one item showing funds arising wholly from the real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor; the second fund to be pro rata divided among all creditors"* (R. 27, 57). The judgment lien creditors, the trustee, and all other creditors assented to this proposal, and it was so agreed and stipulated in the record, and administration of the estate from that time on proceeded on this basis (R. 27). Further, this agreement among all the creditors was with *the specific understanding that the liens were to remain intact to the judgment lien creditors until their claims had been paid in full.*

Thereafter, there were seven dividends arising from the general fund (R. 27) and four dividends arising out of the real estate fund (R. 60-61). All of the creditors, including the Chase Bank, had notice and knowledge of such distributions, and acquiesced thereto, and participated therein, and did receive dividends on their unsecured claim (R. 27, 61). *No exceptions were ever taken to the orders for distribution.*

Later, the United States National Bank of Johnstown was liquidated (and its affairs are now fully closed) and the judgment of the said bank was assigned and transferred, for value, to the United States National Bank *in* Johnstown on October 28, 1942 (R. 54). All dividends paid prior to March 16, 1942, were paid to the Liquidating Trustees of the United States National Bank of Johnstown. The only dividend received by the United States National Bank *in* Johnstown were $329.93 out of the personal fund, and $68.33 out of the real estate fund. The United States National Bank *in* Johnstown is now entitled to all of the

rights, title and interest in and to the said judgment lien claim that were possessed or had by the United States National Bank of Johnstown.

Your petitioners contend that the determination of the United States Circuit Court of Appeals for the Third Circuit, made and entered on the 7th day of May, 1946, was erroneous and violative of their constitutional rights; that the said determination is based upon erroneous conclusions of law, and that error has occurred in reversing the order of the District Court of the United States for the Western District of Pennsylvania.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240-A of the United States Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347.

Questions Presented

1. In a bankruptcy proceeding, where the value of an asset is far in excess of the value of the liens asserted against it, has the Court the right and power of allowing the trustee to retain and administer such property for the benefit of creditors?

2. Will the Bankruptcy Court sustain and uphold a plan for administration and distribution of the assets to which the lien attaches, where such plan is proposed and promoted by the trustee and his attorney, and such plan is accepted and agreed to by all creditors, both secured and unsecured, and which plan provides that judgment lien creditors shall receive the proceeds from the sale of real estate, and in addition thereto, also share on a pro rata basis with general creditors in funds derived from personalty?

3. In the above or foregoing question, where such a plan for administration and distribution of the assets of the estate was proposed to judgment lien creditors for the sole and express purpose of inducing them to forbear and refrain from enforcing their liens so that unsecured creditors might also receive some benefit and share in the estate, and where such a plan has been accepted and agreed to and approved by the trustee and all creditors, shall a bankruptcy court acting under equitable principles and powers rule that such secured creditors have waived their liens to the security by their acceptance of dividends on a pro rata basis with general or unsecured creditors?

4. Where such a plan as above stated for the administration and distribution of assets of the bankrupt estate has been accepted and agreed to by the trustee and creditors, both secured and unsecured, and the secured lien creditors in consideration of their forbearance to enforce their liens are to be allowed to share a general fund on a pro rata basis with unsecured creditors, may a general creditor who was a party to such plan and was active in promoting the plan, and who has also received seven dividends over a period of many years, now come in and object and claim the secured lien creditors had waived their liens or security, or is he equitably estopped by his acts and conduct?

5. Did not the acts and conduct of the trustee, in effect and purpose, amount to an election to redeem the property on an installment or deferred payment plan, after having agreed with the secured creditors as to the value of their security, and are not creditors who participated in such agreement and acquiesced thereto now estopped from objecting thereto, and are not the acts and conduct of the trustee attributable to them?

6. Did the Court commit error in holding that the "Amended Liquidated Claim" of the United States National Bank of Johnstown contained no recital of their security when reference was made to the judgment they had procured against the bankrupt"?

7. Was the majority opinion of the Court of Appeals in error in their reversal of the order of the District Court?

8. Is it against public policy or interest for the trustee, the lien creditors, and all general creditors of the bankrupt estate who are the only persons having an interest, or concerned with the affairs of the bankrupt, to form a plan for distribution of the assets on a fair and equitable basis?

Reasons for Granting the Writ

1. A bankruptcy court is a court of equity seeking to administer the law according to its spirit, and not merely by letter. Proceedings in bankruptcy are generally in the nature of proceedings in equity and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties.

2. The determination by the court below was in disregard of the vested rights of your petitioners, and the effect of the judgment of that court is to deprive the petitioners of its property and lien rights in the asset of the bankrupt estate to which it attached.

3. Petitioners contend that at no time throughout the bankruptcy proceedings did they directly or indirectly manifest, by act, intention, or deed, a waiver or release of their liens, but on the contrary they did always act, govern and conduct themselves in such a manner as to affirmatively

show they relied and intended to preserve their liens (R. 30, 31).

4. Petitioners contend that their acceptance of the trustee's plan was with the specific agreement and understanding their liens were to be preserved and remain intact until they received full payment of their claims.

5. Petitioners contend that it was for the interests of general creditors to keep the estate intact, as this was their only hope or possibility of realizing anything on their claims, and it is inequitable and unjust that they should be penalized to their irreparable damage and injury, especially so, as they have been open and above board with all parties, unless they be placed and restored to their original condition and status.

6. Petitioners contend that the only persons or parties who are concerned or ever had an interest in this estate were the creditors, and it is not against public policy or interest for the trustee and the creditors to formulate a plan for the equitable administration and distribution of the assets of the estate.

7. Petitioners contend that after the agreement of all the parties as to the method of administration and distribution of the assets of the estate, and the subsequent distribution of dividends, all parties and creditors who participated in such plan and received dividends are estopped and barred by laches to object thereto.

8. Petitioners contend that good faith and equity on the part of creditors who now after a period of more than sixteen years make objections to the allowance of their claims as secured, requires that such creditors be estopped, or to restore petitioners to the same condition and status as originally had.

9. Petitioners contend there has been no fraud or misrepresentations such as would mislead others or cause them to suffer to their damage or injury. That all of their acts and conduct have received the approval of the trustee and the bankruptcy court.

10. Petitioners contend that over this long period of time, without any objections on the part of the Chase Bank, they had every right to rely and believe that the Chase Bank had acquiesced to the plan of the trustee.

Prayer for the Writ

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be named therein, a transcript of record and proceedings herein; and, that the order of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court; and that your petitioners have such further and other relief in the premises as to this Honorable Court may seem just and proper.

ROBERT I. RUDOLPH,
Woodward Building,
Washington 5, D.C.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 371

UNITED STATES NATIONAL BANK IN JOHNSTOWN, AND FIRST NATIONAL BANK OF SOUTH FORK,

Petitioners,

vs.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AND LESTER LARIMER, TRUSTEE

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1

Opinion Below

Argued January 24, 1946.
Decided May 7, 1946.

The United States Circuit Court of Appeals for the Third Circuit rendered a decision on May 7th, 1946, and is reported — Fed. (2) — (R. 79-86).

Dissenting opinion (R. 86-89).

2

Jurisdiction

The petition to which this is attached sufficiently states facts that appear material to the consideration of the questions presented.

3

Statement of the Case

The essential facts in the instant case are fully set forth in the accompanying petition for Writ of Certiorari, and in the interests of brevity are not further elaborated upon. All necessary points involved shall be discussed in the argument to follow.

4

Summary of Argument

1. A lien acquired by legal proceedings on the property of the bankrupt more than four months prior to the filing of the petition in bankruptcy, and adjudication, is not affected by the bankruptcy of the debtor.

2. A secured creditor does not lose or waive his security where he accepts dividends from the estate which are realized through a plan proposed by the trustee and which is accepted by all creditors, which plan was formulated and made for the express purpose of inducing such secured creditors to forbear in the enforcement of their liens.

3. A creditor is subject to laches and estoppel where there is long delay and inaction on his part to assert an objection to the allowance of a claim.

4. A Bankruptcy Court is a Court of Equity and will look through the form of a statute to the substance thereof.

It will administer the law according to its spirit and not merely by letter.

Argument

Point 1

A lien, acquired by legal proceedings on the property of the bankrupt more than four months prior to the filing of the petition and adjudication in bankruptcy, is not affected by the bankruptcy of the debtor.

Although the Bankruptcy Act contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed, by virtue of the provisions in Sec. 67c, and 67f, avoiding only liens obtained by legal proceedings within that period, it is clearly implied that liens acquired by such proceedings before the four-month period are saved from operation of the Act, and consequently, a lien so acquired, if valid under the state law, is not affected nor dissolved by the subsequent bankruptcy of the debtor. *Dunn Salmon Co. v. Pillmore*, 106 N. Y. S. 85; *In re Blumberg*, 1 A. B. R. 633; *Matter of Schow*, 32 A. B. R. 494.

In Stratton v. New, 51 S. Ct. 465, 75 L. Ed. 1010, Justice Roberts said, on page 1094: "The bankruptcy law contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed. But it is clearly implied that they shall be saved from operation of the law, for sec. 67f voids only liens acquired by legal proceedings within that period. It has consequently been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the bankruptcy court in the distribution of the estate, in accordance with applicable local law."

Also *In re Wood*, 95 F. 946; *Re Frazer*, 261 F. 558.

In re Torchia, 188 F. 207, which holds—"Under the law of Pennsylvania, rents collected by the trustee from the property of a bankrupt which is subject to valid liens, belongs to the lienholders and not to the general estate."

Re: *Merchants and Mechanics Bank of Columbus*, 61 F. (2) 814.

In re Knox-Powell-Stockton Co., 100 F. (2) 979—It is clear that adjudication in bankruptcy does not exist with valid liens, and that the trustee takes the property subject to all such liens as would have been enforceable against it in the hands of the bankrupt himself.

Seymour v. Wildgen, 137 F. (2) 160—What property belongs to the bankrupt as of the date of bankruptcy; what liens, if any exist thereon; the validity of such liens, order of priority among creditors having liens, and other cognate questions are governed by the law of the State and not by provisions of the Bankruptcy Act.

In re Webber Motor Co., 52 F. Supp. 742—A trustee in bankruptcy, by operation of law, succeeds to the property of the bankrupt subject to all liens, claims, incumbrances and equities which were enforceable against the bankrupt.

Attention is also directed to the proofs of claim filed by the petitioners (R. 11; 12; 19-20). Such claims did contain statements and recitals of the nature and character of such claims and the securities attaching thereto. *These claims had been filed and allowed as secured claims on the property of the bankrupt.* The security and liens of the petitioners were recognized by the bankruptcy court, the trustee, and all creditors. Evidence thereof was made by the referee's reports on distribution of the assets. *There were no objections made by creditors to the dividends declared.*

Wuerpel v. *Commercial Germania Trust, et al., 38 A. B. R. 223*—The filing of a claim as unsecured which has been al-

lowed and on which a dividend has been paid does not estop the claimant from subsequently asserting a right to priority for the first time in the absence of proof to show that the trustee has been misled or injured by the delay in asserting the alleged priority.

Re *Ashland Steel Co.*, 21-A. B. R. 834.

POINT 2

A secured creditor does not lose or waive his security where he accepts dividends from the estate which are realized through a plan proposed by the trustee and which has been accepted by all creditors, which plan was formulated and made for the express purpose of inducing such secured creditors to forbear in the enforcement of their liens.

In the instant case, it was established that there were admitted legal liens against the real estate of the bankrupt which had been obtained more than four months prior to the date on which the petition was filed. The legality of such liens was not questioned by the trustee nor any creditors. The property to which such liens attached was valued by the trustee and parties of interest in the estate for the sum of $90,000.00. The claims of the first and second judgment lien creditors amounted in the aggregate to approximately $28,500.00. This made it apparent that there might be a substantial equity in such asset for the benefit of creditors.

The apparent value of the securities of the first and second judgment lien creditors must have been determined at the very outset, and this by agreement between such lien creditors and the trustee, and the attorney for the trustee. That other creditors were informed and had personal knowledge thereof is attested by the records of the referee. Section 57h, of the Bankruptcy Act provides a number of methods for determining or ascertaining the value of securities.

Among them, it is provided that the value may be established between such secured creditors and the trustee *by agreement. First National Bank* v. *Cameron*, 31 A. B. R. 605; *Re: Rochester Pad & Wrapper Co.*, 20 F. Supp. 295, 34 A. B. R. (NS) 396.

In re: Grive, 153 F. 597—The court said "Let the trustee and creditors holding such liens get together and determine by agreement or compromise or arbitration what the security covered by such liens is worth."

As stated above, there was a clear recognition on the part of all concerned that the equity in the said asset might be of considerable value, provided however, that the asset be left intact. That this was the case and real condition, is aptly phrased and stated in the referee's report or opinion (R. 25) wherein he says as follows:

> *"Contrary to the ordinary policy of early liquidation, the general creditors without exception have approved the policy of the Trustee in retaining intact the assets of the estate and accepting income therefrom. The wisdom of this procedure is quite apparent. The assets which would have been sold for an insignificant amount, have, through the years, produced substantial income which has been distributed to creditors in the way of dividends. In order to administer the estate on this basis, it was necessary to have the approval of the two lien creditors for the reason it would have been inequitable to demand that the security for their liens, consisting of an undivided interest in certain real estate, be kept intact for an indefinite period rather than be sold in order to liquidate the liens. It was assumed from the outset that there was sufficient security in the way of real estate against which the two judgments, the first of which was that of the United States National Bank of Johnstown, and the other the judgment of the First National Bank of South Fork, were liens, to pay them in full, together with interest and costs."*

The plan for administration and distribution of the assets of the estate, as proposed by the trustee and his attorney, and which was accepted by all creditors is stated in the record (R. 26-27). With reference to the question whether the lien creditors waived their security by the acceptance of the plan for distribution, reference is again made to the referee's opinion (R. 30), which states as follows: "*The matter was approached on this theory—the security was worth more than the liens against it, and it would be an advantage to the unsecured creditors to have the estate remain intact—to accomplish this purpose the lienors should be importuned not to liquidate their security—that it would be to the advantage of general creditors to get the lien creditors out of the road—that as an inducement for not selling their security, the lienors would be permitted to participate in the dividends from the personalty with other creditors—all this with the understanding that the liens were to remain intact until the claims were paid in full.*"

As has been stated previously, the plan proposed by the trustee was actually accepted and adopted by all creditors in this bankruptcy proceeding, and this plan as administered to by the trustee was the basis for all subsequent distributions to creditors. During the period from November 15, 1935 to December 2, 1942, seven dividends were paid on that basis (R. 27; 60). *In all of such dividends there was consent and acquiescence on the part of the Chase Bank, as well as by other creditors.* At all times, The Chase Bank took an interest and active part in the affairs of the bankrupt estate, and their attorneys attended many meetings of creditors. Further, the Chase Bank has admitted and stipulated that they received statements showing them how the dividends were distributed or that such records were available to them (R. 61).

That there was never any intent on the part of the lien holders to waive their securities was recognized by the creditors and the opinion of the referee (R. 30-31) brings this clearly out. For the record, the two lien creditors have carefully revived their judgments in the manner provided by law, and the trustee has been made a party to such proceedings (R. 31, and footnote, R. 89). *A Lien is not waived nor lost by any acts or conduct on the part of the holders of the lien that is not inconsistent with his intention to claim the lien, and is not affected by bad faith or fraud. Re: Collingwood Motor Sales Co.*, 72 F. (2) 137; *Re: Marine Transit Corp.*, 94 F. (2) 7.

The trustee, generally, is not obliged to administer property burdened with a valid lien, and he may be permitted to abandon the property where it appears there is no equity therein or nothing to be administered, *but if it appears in the exercise of sound and honest discretion that there is a substantial equity in the property for the general creditors, it is the right and duty of the trustee to administer the property and to realize on such equity for the benefit of general creditors, and in the event of such administration, the lien creditors lose none of their rights. Lerner Stores Corp.* v. *Electric Maid Bake Shops*, 24 F. (2) 780; *Britton* v. *Western Iowa Co.*, 9 F. (2) 488.

Hartford Accident & Indemnity Co. v. *Coggin*, 29 A. B. R. (NS) 514 Reversing 9 F. Supp. 785.

Although a claim is filed as unsecured and the claimant participates in the election of a trustee, security held by the claimant is not thereby waived, where it appears that the filing was inadvertent and the instruments evidencing the security were attached to the claim.

Also *Re: Ashland Steel Co.*, 21 A. B. R. 834.

In Wuerpel v. Commercial Germania Trust, etc., 38 A. B. R. 223, *it was held that the filing of an unsecured claim which had been allowed and on which a dividend had been paid, does not estop the claimant from subsequently asserting a right to priority for the first time in the absence of proof that the trustee had been misled or injured by the delay in asserting the alleged priority.*

Re: Purvis, 293 F. 102, 1 A. B. R. (NS) 595.

In re Grive, 153 F. 597, the Court said, "*In treating the claims strictly as unsecured for the purposes of a dividend, further thought is required. Here equity steps in and forbids one to follow too literally the text of the bankruptcy law. From an equitable point of view, and looking at the final results, the claims in question ought to be treated as secured.*"

In *Horton v. Queen's County Mach. Corp.*, 166 N. Y. S. 662, Justice Copsey said:

> "*Defendant's third contention is that the plaintiffs have waived their rights to enforce their lien. This is Predicated upon the contention that the plaintiffs filed their claim with the bankruptcy court and accepted dividends the same as all general creditors. Plaintiffs did file their claim but in it asserted their right to the very lien now sought to be foreclosed. There was no waiver involved in that act. They had the right to prove their lien, Bankr. Act 57 subd. h. It is stated as a general rule that if a secured creditor proves his debt as unsecured, he thereby waives his security. Collier on Bankr. (9th Ed) p. 726. . . . But here, the plaintiffs did not prove their claim as an unsecured debt. On the contrary, in their proof of claim, they asserted their right to their lien as security.*"

Here, as in the above matter, the petitioners have always asserted their security in the claims they have filed (R. 10; 11; 12-13). In the petition of the Chase Bank, they specifi-

cally alleged petitioners had always asserted their security (R. 6-9) (R. 15-18; 19-20).

Point 3

A creditor is subject to laches and estoppel where there is long delay and inaction on his part to assert an objection to the allowance of a claim.

It has been repeatedly stated that the plan submitted was formulated by the trustee was accepted by the lien creditors with the specific understanding that their liens upon the asset of the bankrupt were to remain intact until they had been paid in full (R. 30). Following such agreement, the trustee proceeded with the administration of the estate in accordance thereto, and thereafter, seven dividends were paid to creditors.

It was not until October 17, 1942, sixteen years after the adjudication in bankruptcy, that the Chase Bank filed its petition to adjudge that the United States National Bank had waived its lien (R. 6-9). During the intervening period, they had participated and accepted seven dividends which had been distributed, and to none of which they had filed objections. *In consideration thereof, it is pertinent to note the remarks from the opinion of Gibson, District Judge (R. 76).*

> *"The court is definitely satisfied that counsel for the Chase Bank had recommended and had full knowledge of the agreement of general creditors that lien holders, in return for their ceasing to attempt to realize upon their liens, should participate in both the judgment creditor and general funds. This agreement was of great benefit to the general creditors. Had the secured creditors realized upon their liens a sufficient amount would have been obtained to satisfy them, but the effect of it would have been almost the total wreck of the general claims. When this fact is joined to the influence of counsel for the Chase National Bank in promoting the*

participation agreement, and the further fact that the bank, without any demur whatsoever, had knowledge of the seven distributions, prior to its exceptions to the Referee's orders, wherein the lien holders had received all the amount distributed from the realty fund and had participated in the general fund, it would seem that the Chase National Bank is equitably estopped from relying upon a contention which has become entirely technical, strong as its position might have been under other circumstances."

In re Thorton, 7 F. Supp. 613—A bankruptcy court will apply the equitable doctrine of estoppel.

The doctrine of laches may properly be applicable to prevent the assertion of state objections or defenses against claims in bankruptcy, and long delay or inaction on the part of a creditor resulting in prejudice or injury to the claimant will prevent the objection from being made, particularly where the claim has previously been allowed; and for this purpose the laches or inaction of the trustee will be imputed to creditors who will be bound thereby. French v. Long, 42 F. (2) 45; *Cooper* v. *Rauch*, 82 F. (2) 1005.

In re: National Public Service Corp., 68 F. (2) 459. In this case, an appeal was made to an order allowing a compromise plan. In the opinion of Justice Hand, p. 463, it is stated as follows:

"The utilities Power and Light Company, as we have said, did indeed complain to the trustee, and its attorneys at the outset; they were told these gentlemen saw no impropriety in the situation. They did not then question the Referee; instead they continued to work along with the trustee, its attorneys, and the creditors' committees in consideration of the many reorganization plans. Nobody would have supposed that they meant to bring the matter up if any plan had got acceptance; good faith forbade such a course. After all plans for reorganization broke down, they co-operated in the exceedingly onerous work of preparing a compromise

with the bank; they did not seek to balk this because of the single administration. The compromise was settled; the trustee's petition for leave was filed; the time for creditors' meeting was fixed and creditors advised. Not till then, and then by motion on the return day, on the very day before the meeting did they even intimate to any court that the whole proceeding had all along been violating the cardinal doctrines of equity. After complaisance *of over eight months during which they had gone along hand in hand with the trustee, they proposed to upset the compromise and to change the fixture of administration of the estate. Other creditors may be entitled to ask us to do this, but we are not disposed to hear that complaint in the mouths of the appellant."*

In re: American S. S. Nav. Co., 14 F. Supp. 106. In this case a petition of bankruptcy was filed on March 9, 1920, and the company was in due course adjudged a bankrupt. A creditor filed a claim in February, 1921 for the sum of $6113 alleging damages arising from a breach of contract. The claim appears to have been allowed because in August, 1929, more than eight years later, a schedule for distribution was submitted in which this claim received its distributive share. At that time, one of the creditors filed an objection to its allowance, and upon appeal, Justice Kirkpatrick held:

"That the debt was duly liquidated at the amount claimed and that the trustee and creditors appeared to have waived the matter of its liquidation. When the claim appeared in the referee's schedules for distribution, eight and one-half years later, that was the only time an objection was filed.

"The doctrine of laches is equally applicable in bankruptcy against stale defenses. Unconscionable delay in raising objections could only result in injury beyond repair to the claimant's ability to properly present his claim and meet the defense raised against it. Laches

of the trustee must be imputed to those for whom he acts."

POINT 4

A Bankruptcy Court is a Court of Equity and will look through the form of a statute to the substance thereof. It will administer the law according to its spirit and not merely by letter.

A court of bankruptcy is a court of equity. It seeks to administer the law according to its spirit, and not merely by letter. *In re: Kane*, 127 F. 552. Equitable doctrines and principles prevail therein and are controlling. The court will not permit itself to be used for purposes of perpetrating a fraud or attaining inequitable results. *In re; Fox West Coast Theatres*, 88 F. (2) 212.

The purpose of the Bankruptcy Act is to distribute the assets of the bankrupt equally and fairly among his creditors. Equality of distribution among the creditors is the end in view. Technicalities will be avoided and the construction will be adopted which will best promote the object of the Act. *Merchants & Mechanics Bank of Columbia* v. *Sewell*, 61 F. (2) 814; It permits creditors to supervise and direct liquidation of the estate. *Re Day Lumber Co.* 8 F. (2) 146.

In the instant case, it must be borne in mind that the assets of the bankrupt were in effect the property of the creditors entitled to liens. As the parties realized, if the lien creditors had foreclosed upon their liens and securities, there would have been little, if anything, left for general creditors.

As a practical result and effect of the plan which was adopted and carried out by the trustee, it really amounted to the trustee's redemption of the property to which the liens attached, on a deferred payment or installment basis. This, without any investment or risk on the part of the trustee or the creditors.

This plan was an agreement among the *only parties who had an interest* in the estate. No other persons or concerns were interested in the proceedings. It allowed and enabled creditors, subject to their particular interests and character of claims to participate and receive some benefit. Can it justly and honestly be said that such an agreement between the trustee and creditors, is against public policy and interest?

In re: Interstate Refineries, 18 F. (2) 360—*The administration and distribution of the property of a bankrupt is a proceedings in equity, and the proceeding in a bankruptcy court to establish and enforce a lien or claim against the assets of the bankrupt is equitable in nature. Such a court will look through the form of a statute to the substance thereof, and will enforce a right as it is found to exist.*

The rights of your petitioners rise to a higher plane than the strict interpretation oft he Act. The Act is a remedial statute, and should therefore be interpreted reasonably and according to the fair import of its terms with a view to effect its object and to promote justice. It must be given a broad and liberal construction. *Re: Calhoun Supply Co.*, 26 A. B. R. 528.

It is respectfully submitted, that in order that the errors herein pointed out may be corrected and justice done, the judgment of the United States Circuit Court of Appeals for the Third Circuit be reviewed and reversed, and that to such an end a writ of certiorari be granted.

Respectfully submitted,

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Woodward Building,
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Counsel for Petitioners.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 371

UNITED STATES NATIONAL BANK IN JOHNSTOWN and FIRST NATIONAL BANK OF SOUTH FORK,
Petitioners,

vs.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK and LESTER LARIMER, *Trustee.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION

WILLIAM DEAN EMBREE,
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THOMAS P. FARLEY,
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Opinions Below

The opinions of the Circuit Court of Appeals, Third Circuit, are reported in 155 F. (2d) 755.

The opinions rendered by the District Court are reported in 56 F. Supp. 190 and 61 F. Supp. 151.

Statement

A voluntary petition of bankruptcy was filed herein on June 10, 1925 by Harvey C. Stineman, the bankrupt, and the matter referred to a Referee. Among the assets of the estate was an undivided one-sixth interest in certain coal lands. The petitioners claim that the value of this asset

was appraised and fixed at $90,000 (Petrs.' br., pp. 2, 15). The record, however, fails to disclose that any such appraisal or valuation was made.

On January 8, 1927 petitioner, United States National Bank in Johnstown (herein referred to as the Johnstown Bank) filed a claim in the amount of $10,000, reciting as security the lien of a judgment it had procured prior to the filing of the petition (10a). A similar claim was filed by First National Bank of South Fork (herein referred to as the South Fork Bank) on June 29, 1936 in the amount of $18,463.45 (19a). The latter was based upon three judgments rendered against the bankrupt in the respective amounts of $11,290, $5,520 and $1,653.45 (20a). It is only on the $11,290 judgment that the South Fork Bank has asserted a lien upon the real property of the bankrupt.

Thereafter and on July 14, 1932 the Johnstown Bank filed a claim designated as an "amended liquidated claim" for $13,685 (12a). The difference in the amount of its original claim and the "amended liquidated claim", in the sum of $3,685 represented interest accruing after bankruptcy on the aforementioned judgment of $10,000. The question of the right to accrued interest has been determined and is not involved here.

The "amended liquidated claim" contains no recital of any security and appears to be a general claim which takes the place of the original claim.

Since the filing of its claim the Johnstown Bank has asserted that it has a judgment lien upon the real property of the bankrupt including the coal lands above referred to and has received and accepted the proceeds of the sale of certain of the bankrupt's real property (60a). This bank has also participated in the distribution of the general assets of the estate and received and accepted seven dividends on the full amount of its "amended liquidated claim", to wit, on $13,685 (60a). It is undisputed that its alleged judgment lien was never valued in this proceeding.

The South Fork Bank likewise failed to have the value of its alleged lien fixed and also participated in the distribu-

tion of the general assets of the bankrupt's estate, receiving seven dividends on the full amount of its $18,463.45 claim (17a).

General claims in this estate amount to approximately $225,000. Among these is the claim of respondent, The Chase National Bank of the City of New York (herein referred to as Chase Bank) in the amount of $55,231.98. This claim was allowed on May 14, 1935 and represents a reduction from the Chase Bank's original claim which was secured in part by collateral given by the bankrupt. The reduction was ordered upon exceptions filed by the Johnstown Bank and the South Fork Bank.

Questions Presented

The primary question presented is whether or not a judgment lien creditor waives his security where a claim for the full amount of his debt is filed and dividends accepted thereon without first having the alleged security valued. A secondary question is also presented as to whether a general creditor, by remaining silent after payment of dividends to judgment lien creditors on the full amount of their claims, is estopped from asserting a waiver of security by such judgment lien creditors.

The questions presented at pages 5 and 6 of the petition are based upon the false assumptions: (1) that all the creditors in this proceeding, secured and unsecured, entered into an agreement permitting the judgment lien creditors to retain the security of their liens without having such liens valued and at the same time participate with general creditors in the distribution of dividends on the full amount of their claims and (2) that the judgment lien creditors were induced to forbear and refrain from enforcing their lien and thereby created a substantial benefit to the general creditors. The record discloses no such agreement nor inducement to forbear. On the other hand, it discloses that the judgment lien creditors elected a remedy and thereby waived their security.

POINT I

There is no question of local law nor general law, nor any important question of federal law involved in this record, and no special reasons are shown by the petition why a Writ of Certiorari should be granted.

In this case there are no special or important reasons calling for the exercise of this Court's power of supervision through its Writ of Certiorari. None of the reasons indicated in Rule 38 of the Rules of this Court will be found in the record presented for review in this case.

There is no important question of local law involved nor any important question of general law, nor is there any important question of federal law which could be settled in this case if the Writ of Certiorari should be granted. There is likewise no conflict between the decision sought to be reviewed and any prior ruling of this Court, nor has there been any departure from the accepted and usual course of proceedings calling for an exercise of this Court's power of supervision.

In *In Re O'Gara Coal Co.*, 12 F. (2d) 426, a petition for a Writ of Certiorari was made to this Court seeking a review of a similar question as here presented relating to waiver of security by a creditor. This Court denied that application 271 U. S. 683.

Although the opinion of the Circuit Court sought to be reviewed specifically refers to the provisions of the Bankruptcy Act which apply to the distribution in this proceeding, the petitioners have failed both to point out any error therein or discuss the applicable provisions of such Bankruptcy Act. Petitioners likewise failed to show that a construction of such provisions by this Court is necessary or desirable.

POINT II

Where a creditor files a claim for the full amount of his debt and accepts dividends thereon, he waives any security which he might have had.

Section 65 of the Bankruptcy Act (11 U. S. C. A. 105) provides in part as follows:

> "a. Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Section 57h of the Bankruptcy Act (11 U. S. C. A. 93h), on the other hand, permits secured creditors to have the value of their securities determined, the amount of such value credited upon their claims and dividends paid, *only* on the unpaid balance. That Section reads as follows:

> "h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court."

Thus the Bankruptcy Act does not permit a secured creditor to claim ownership of a charge against some specific fund or property on which he could release all or part of the amount of his claim and at the same time look to the general assets of the estate to liquidate the same debt. It is fundamental that the security must first be valued and credited before participation in distributions from the general estate are permitted and dividends may be paid only on the balance. In *H. Muehlstein & Co.* vs. *Hickman*, 26 F. (2d) 40, the Court said at page 44:

"In bankruptcy, of course, the claimant can recover only in the manner, and to the extent, prescribed by the act."

There is no dispute here that the Johnstown or South Fork Banks failed to have the value of their alleged security determined as provided by Section 57 of the Bankruptcy Act. By accepting the dividends therefor on the full amount of their claims, these two banks elected to take their place with unsecured creditors and share ratably with them. The effect of such election is a waiver of security.

In *In Re O'Gara Coal Co.*, 12 F. (2d) 426, cert. den., 271 U. S. 683, the Court said:

> "'The provision and purpose of the law is that those having security shall, in the manner provided by the statute, get the benefit of that security, but must do so at the expense of reducing the claim upon which they are entitled to participate as a general creditor in the funds of the estate, * * *. When one has two inconsistent remedies and elects to pursue one, he abandons the other." (p. 429)

In *In re Fisk & Robinson*, 185 Fed. 974, the Court held that the filing of a claim against a bankrupt's estate and the receipt of dividends thereon is a waiver of the creditor's security. There the Court said at page 975:

> "It is quite true that to file a claim is to waive security (Ansonia Brass & Copper Co. *v.* Babbitt, 74 N. Y. 395), for one may not collect dividends upon the whole debt and then take security upon a part. The rule is similar to that which confines a broker's customer to his election between his claim and his stocks. Re Berry, 174 Fed. 409, 98 C. C. A. 360. Had the claimant actually received dividends, the question would be clear. Nor does it matter, I think, that the funds are separate as the referee suggests; for the waiver operates, whether the claim to the security arises in the bankruptcy court or out of it. Ansonia Brass & Copper Co. *v.* Babbitt, supra. It is enough that the claimant should have elected not to assert his security, and that election would be signified by going ahead upon a claim for full dividends."

In *In the Matter of Florence Pruner Young, Bankrupt*, 9 Am. B. R. (N. S.) 544, the Court refused to permit an amendment of an unsecured claim after the receipt of a dividend thereon to show that it was secured on the ground that the creditor, having pursued the full amount of its claim and having been paid dividends thereon, had elected its remedy. The Court said at pages 545-546:

> "In the instant case, in addition to the filing of the proof of claim of an unsecured debt, the claimants specifically stated '(5c) That no note has been received nor judgment recovered therefor (except assignment of note of bankrupt favor Grove City State Bank)'. A dividend of 20 per cent was declared on July 10, 1926, and the claimant in the instant case received and retained his 20 per cent. A final dividend also has been declared, after which time the claimant seeks by amendment to change his claim into a secured or preferred claim. There is nothing on the record which shows that the claimant made his proof of claim as an unsecured debt without knowledge of all the facts, or even in ignorance of his legal rights to prove as preferred claims the judgments which were assigned to him. From all that appears upon the record at the present time, he deliberately elected to pursue his remedy as a general claimant, acted upon that election, and has received part of the fruits of that election in the 20 per cent dividend which has actually been paid to and received by him. We are of the opinion that he should not now be permitted to change that election.
>
> • • •
>
> "In the instant case, the creditor elected the remedy which he would pursue for the amount of this claim; his election was acted upon; and he was paid dividends in accordance with the claim which he deliberately made. There are no facts set forth in his petition to amend which would justify the allowance, under these circumstances, of the amendment asked."

In *First National Bank* vs. *Exchange National Bank*, 179 App. Div. 22, the Appellate Division held that the ac-

ceptance of dividends was a waiver of security. The Court said (pp. 32-33):

> "The bank, in what it did in the Bankruptcy Court, elected to waive any lien and security it had, and prove its claim as an unsecured creditor, and the bank by accepting the dividends ratified the acts of its cashier in waiving the security and proceeding to prove its claim as an unsecured one, and it must be held that when the bank proved its claim under the three Clark notes in the Bacon bankruptcy proceedings as an unsecured claim, it waived any security it had upon the pledged stocks in question, and its lien thereon became extinguished. * * * Defendant Exchange National Bank, having elected its remedy by filing a claim and accepting a dividend as an unsecured creditor of Francis Bacon, being in possession of all the facts at the time it filed its claim, must be deemed bound by its action in electing its remedy, and has no claim or lien upon the stocks in question." (*Matter of Bloss*, 4 Nat. Bank Rep. 147; Heard *v.* Jones, 15 id. 402; Collier Bankruptcy [8th ed.], 598.)"

Although the judgment in the above case was modified on appeal, the quoted ruling was approved (226 N. Y. 633).

To the same effect:

In re Burr Mfg. & Supply Co., 217 Fed. 16;

In the Matter of Cann, 47 F. (2d) 661;

In re Ballance et al., 219 Fed. 537;

Cumberland Glass Mfg. Co. vs. *De Witt and Co.*, 237 U. S. 447;

Merchants' Nat. Bank of Syracuse vs. *Comstock*, 55 N. Y. 24;

Elston vs. *Rusch*, 229 N. W. 503 (Mich.);

Hewitt vs. *Hayes*, 91 N. E. 332 (Mass.);

R. L. Davies & Co. vs. *Blomberg*, 117 S. E. 497 (No. Carolina);

Hunt vs. *Holmes*, Fed. Cas. No. 6890;

Ex parte Morris, Fed. Cas. No. 9823.

In *Elston* vs. *Rusch*, *supra*, the Court after holding that a secured creditor is only entitled to a dividend on the amount of the claim in excess of the value of the security, said at page 504:

> "He may not file a claim for the full amount of the debt and receive a dividend based on it and at the same time recover all of the property in an appropriate suit. This not only would give claimant a preference over other creditors, but would be a fraud on the bankruptcy court."

The principle upon which the applicable doctrine proceeds is set forth in *Ansonia Brass and Copper Co.* vs. *Babbitt*, 74 N. Y. 395. There the Court of Appeals said at page 404:

> "The principle upon which this doctrine proceeds is that otherwise the proceeding would operate as a fraud upon or to the injury of other creditors, by enabling the secured creditor to obtain a dividend on his whole debt, out of the common fund, and at the same time have the benefit of the security, thereby producing inequality in the distribution between him and the other creditors."

POINT III

The Chase Bank is not estopped from asserting that the judgment lien creditors waived their security by acceptance of dividends.

Petitioners argue that the Chase Bank is estopped from contending that these judgment creditors waived their liens and assigns as reasons: (1) a participation agreement was made to which all creditors consented, (2) forbearance to foreclose their liens, and (3) Chase Bank permitted seven distributions to be made before demurring (Petrs.' br., p. 15, *et seq.*).

In answering this argument, the Circuit Court, after reference to the applicable provisions of the Bankruptcy

Act, and the lack of necessity for the course which petitioners claim was pursued, said:

> "The parties have demonstrated, as we have indicated, a complete disregard for the pertinent provisions of the Bankruptcy Act. Those provisions were not intended by Congress to apply only to certain individuals or under certain circumstances. Congress intended the provisions of the Act to be of universal application and to establish principles which Congress deemed necessary for the public good. The participants in Stineman's bankruptcy proceedings were bound by the law. National Bank in Johnstown and South Fork Bank may not receive the benefits of their securities and also be treated as general creditors to the full extent of their claims. They may not have the benefit of both positions and the liabilities and obligations of neither. Under the law an attempt to assert an estoppel against Chase or any other creditor which would effect such a result is futile." (p. 84a)

It is significant that petitioners neither discuss, criticize nor dispute this reasoning and refrain from making any reference to the pertinent provisions of the Bankruptcy Act. Their reason is obvious. They are aware that, contrary to the policy of such Act, they are striving to maintain "the benefits of both positions and the liabilities and obligations of neither".

It appears in the record (57a) that at a meeting of creditors called on December 31, 1929, the Trustee had a fund on hand representing the proceeds of a sale of real estate and of personalty. After an objection was made to pay the entire sum held to the first judgment creditor, Mr. Little, the attorney for the Trustee, made the following suggestion:

> "*By Mr. Little:* It was at the suggestion of myself, I think, that the order was made to pay this money to the first judgment creditor, with the thought that the two judgments which were liens on real estate being out of the way, we would have a clear sailing for prorated dividends thereafter. My clients, after the suggestion was made, decided that they could not acquiesce

in the suggestion, and requested me to file exceptions, which I was obliged to do. After discussing this with Mr. Keefe, and going over the matter generally, and after examining two of the leases from which the royalties were obtained in order to make up part of the fund for distribution, we suggested that under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors."

It is submitted that the fact that it was suggested that the fund be divided into two items one representing the proceeds of the sale of realty and the other the proceeds from the sale of personalty clearly discloses an intention that the judgment creditors and general creditors were to be separately treated. This also appears from the fact that some of the creditors declined to acquiesce in the suggestion that the entire fund on hand be given to the first judgment creditor. Under the circumstances it cannot be said that the judgment creditors were to receive preferential treatment. Moreover, Mr. Little was also careful to state that the suggested method of distribution was to be "under the law". In other words, in accordance with sound and regular bankruptcy practice.

Contrary to petitioners' statements at pages 17 and 20 of their brief that the plan proposed was actually accepted and adopted by all creditors, the record fails to disclose that all or a majority of the creditors agreed to the method of distribution which petitioners now claim arose from Mr. Little's suggestion. Nor does it appear that the unusual plan now asserted to be the outgrowth of the above statement was submitted to a vote by all creditors or that an order sanctioning such a plan was ever entered. Such being the case, it cannot be contended that an agreement

was made whereby the judgment creditors were permitted to share in the distributions from the general estate.

Petitioners assert that their forbearance to foreclose benefited the general creditors. Wherein a benefit was derived, however, was not established. Throughout their brief they speculate upon what would have happened had they foreclosed their lien. The weakness of their argument is evidenced by the inconsistent positions they strive to maintain. Asserting that the real property was valued at $90,000 and their claims amounted to $28,500, they say at page 15 of their brief "This made it apparent that there might be a substantial equity in such asset for the benefit of creditors". Petitioners then contradict this statement at page 23 of their brief by saying "if the lien creditors had foreclosed upon their liens and securities, there would have been little, if anything, left for general creditors". It is just as reasonable to speculate as to the benefits the general creditors might have derived had there been a foreclosure of the judgment liens. They would at least have had the opportunity, through the Trustee or a committee, to bid for the property free from the liens and perhaps operate it at a profit for their own benefit. Speculation, it is submitted, does not sustain petitioners' contention.

The failure of the Chase Bank or any other creditor to question the acceptance of dividends by the judgment creditors until after several were paid does not create or show laches or estoppel. Such a contention overlooks the fact that an election was made by the petitioners. It also overlooks the fact that the unsecured creditors had a right to assume that the Johnstown and South Fork banks were relying upon the general fund for the payment of their claims. Estoppel operates against the one who made the choice and upon which the others had a right to rely. Silence on the part of the unsecured creditors cannot change the fact that an election was once made. The election having once been made is now final and binding upon the judgment creditors. *In Re O'Gara Coal Co.*, 12 F. (2d) 420, cert. den. 271 U. S. 683; *In Re Fiske & Robinson*, 185 Fed. 974; *In Re Young*, 9 Amer. B. R. (N. S.) 544.

It is respectfully submitted that petitioners' application for a Writ of Certiorari be denied.

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Supreme Court of the United States

UNITED STATES NATIONAL BANK IN JOHNSTOWN and
FIRST NATIONAL BANK OF SOUTH FORK,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
Respondent, and LESTER LARIMER, Trustee.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Opinions Below

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The opinions of the District Court are reported in 56 F. Supp. 190 and 61 F. Supp. 151.

Statement

A voluntary petition in bankruptcy was filed herein on July 10, 1926 by Harvey C. Stineman, the bankrupt, and the matter referred to a referee. On January 8, 1927, petitioner, United States National Bank in Johnstown (herein referred to as the Johnstown Bank), filed a claim in the amount of $10,000. This was apparently intended as a secured claim, since although it recited at one point that the Johnstown Bank had not "received any manner of security whatever, * * * nor has any judgment been rendered thereon", it also recites a judgment against the debtor (R. 8).

A claim was also filed by petitioner, First National Bank of South Fork (herein referred to as the South Fork Bank), on June 29, 1926 in the amount of $18,463.45 (R.

14). This claim recites three judgments rendered against the bankrupt in the respective amounts of $11,290, $5,520 and $1,653.45 (R. 25). The last two judgments were entered within four months of the bankrupt's petition herein (R. 12). It is only on the $11,290 judgment that the South Fork Bank has asserted a lien upon the real property of the bankrupt.

Thereafter and on July 14, 1932 the Johnstown Bank filed a claim designated as "amended liquidated claim" for $13,685 (R. 9). The difference in the amount of its original claim and the "amended liquidated claim" in the sum of $3,685 represented interest accruing after bankruptcy on the aforementioned judgment of $10,000. The question of the right to claim for accrued interest was decided adversely to petitioner (R. 24, 25) and is not involved here.

General claims in this estate amount to approximately $225,000. Among these is the claim of respondent, The Chase National Bank of the City of New York, in the amount of $55,231.98. This claim, in its present amount, was allowed on May 14, 1935 after a reduction from the original claim which was secured in part by collateral. The reduction was ordered upon exceptions filed by the Johnstown Bank and the South Fork Bank.

Among the assets of the bankrupt estate was an undivided one-sixth interest in certain coal lands. Petitioners in their brief (pp. 2, 15) say that the value of this asset was appraised and fixed in the sum of $90,000. The record, however, fails to show that any such appraisal or valuation was ever made. In fact, petitioners indicate that this asset may have been worth even less than the total amount of their combined judgment liens of $21,290 when at page 23 of their brief they state:

> "* * * if the lien creditors had foreclosed upon the liens and securities, there would have been little, *if anything*, left for the general creditors." (Italics added.)

Petitioners' Participation in General Distribution

Since the filing of their claims both the Johnstown Bank and the South Fork Bank have participated in the distribution of the general assets of the estate, and have accepted seven separate dividends. The Johnstown Bank participated on the basis of $13,685, the amount of its "amended liquidated claim" and the South Fork Bank on the basis of $18,463.45. In addition to the dividends from the general estate the Johnstown Bank also accepted, at various times, payments from the sale of real estate in the total amount of $3,003.41 (R. 46-47).

The alleged judgment liens of the Johnstown Bank and the South Fork Bank were never valued or credited in this proceeding. The answer of the Johnstown Bank admits

> "that the value of the lien of said judgment against the bankrupt's real estate has never been fixed . . ." (R. 16.)

This admission explicitly contradicts the statement at page 15 of petitioners' brief that:

> "The apparent value of the securities of the first and second judgment lien creditors must have been determined at the very outset, and this by agreement between such lien creditors and the trustee, and the attorney for the trustee."

The South Fork Bank filed no answer.

Petitioners assert that by agreement they were permitted to participate in distributions from the general funds to the full amount of their claims and at the same time to retain their security. This alleged agreement, they claim, arose from the following statement made by Mr. Little, attorney for the trustee and some of the creditors at a meeting held on December 31, 1929:

> "By Mr. Little: It was at the suggestion of myself, I think, that the order was made to pay this money to

the first judgment creditor, with the thought that the two judgments which were liens on real estate being out of the way, we would have a clear sailing for prorated dividends thereafter. My clients, after the suggestion was made, decided that they could not acquiesce in the suggestion, and requested me to file exceptions, which I was obliged to do. After discussing this with Mr. Keefe, and going over the matter generally, and after examining two of the leases from which the royalties were obtained in order to make up part of the fund for distribution, we suggested that under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors." (R. 43-44)

Mr. Little's statement was vague and susceptible of various interpretations, and it is not clarified by the record as a whole, which was characterized by the Circuit Court as "incomplete and chaotic" (R. 68).

Petitioners' statement (Pets.' Br., p. 4) that the trustee and all creditors assented to Mr. Little's suggestion and "agreed and stipulated" that the judgment creditors' liens were to remain intact while the lienors participated pro rata with general creditors is not supported by the record. On the contrary, not all creditors were present when the statement was made (R. 57) and the record fails to show that any vote was ever taken by creditors as to the alleged method of distribution or that any order sanctioning such method was ever entered.

Questions Presented

1. Do judgment lien creditors in bankruptcy proceedings waive their security where they file claims for the

full amount of their debts and accept dividends based thereon without first having their security valued and credited?

2. In a bankruptcy proceeding, is it inequitable to permit judgment lien creditors to participate in distributions from the general estate to the full amount of their claims and at the same time retain their entire security?

3. Is an agreement valid under the Bankruptcy Act which permits judgment lien creditors to share in distributions from general assets based on the full amount of their claims and at the same time retain their security? If so, does the record herein disclose such an agreement?

4. Are general creditors estopped from claiming, after several dividends have been paid, that secured creditors waived their security by accepting such dividends based on the full amount of their claims without having first had their security valued and credited?

POINT I

Where a creditor files a claim for the full amount of his debt, and accepts dividends based thereon, he waives any security he might have had.

Section 65 of the Bankruptcy Act (11 U. S. C. A. 105) provides in part as follows:

> "a. Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Section 57h of the Bankruptcy Act (11 U. S. C. A. 93h) permits secured creditors to have the value of their securities determined, the amount of such value credited upon their claims and dividends paid, *only* on the unpaid balance. Prior to 1938 that Section read as follows:

> "h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

Thus the Bankruptcy Act does not permit a secured creditor to claim ownership of a charge against some specific fund or property on which he could realize all or part of the amount of his claim and at the same time look to the general assets of the estate to liquidate the same debt. The security must first be valued and credited before participation in distributions from the general estate is permitted and dividends may be paid *only* on the balance.

The policy behind the Bankruptcy Act has been set out by this Court in *American Surety Company* vs. *Bethlehem Bank*, 314 U. S. 314, 319n, where it said:

> "Reflecting the special policy of bankruptcy legislation favoring the general creditor against the secured creditor, the rule prevails in bankruptcy that dividends upon the claims of secured creditors 'shall be paid only on the unpaid balance.' "

There is no dispute here that the Johnstown or South Fork Banks failed to have the value of their alleged security determined as provided by Section 57 of the Bankruptcy Act. By accepting dividends on the full amount of their claims, these two banks elected to take their place with unsecured creditors and share ratably with them. The effect of such election is a waiver of security.

In *In re O'Gara Coal Co.*, 12 F. (2d) 426 (C. C. A. 7th, 1926), cert. den. 271 U. S. 683 (1926), the Court said:

> "The provision and purpose of the law is that those having security shall, in the manner provided by the

> statute, get the benefit of that security, but must do so at the expense of reducing the claim upon which they are entitled to participate as a general creditor in the funds of the estate, * * *. When one has two inconsistent remedies and elects to pursue one, he abandons the other. * * *" (p. 429)

In *In re Fisk & Robinson*, 185 Fed. 974, the Court held that the filing of a claim against a bankrupt's estate and the receipt of dividends thereon is a waiver of the creditor's security. There the Court at page 975 said:

> "It is quite true that to file a claim is to waive security (Ansonia Brass & Copper Co. *v.* Babbitt, 74 N. Y. 395), for one may not collect dividends upon the whole debt and then take security upon a part. The rule is similar to that which confines a broker's customer to his election between his claim and his stocks. Re Berry, 174 Fed. 409, 98 C. C. A. 360. Had the claimant actually received dividends, the question would be clear. Nor does it matter, I think that the funds are separate, as the referee suggests; for the waiver operates, whether the claim to the security arises in the bankruptcy court or out of it. Ansonia Brass & Copper Co. *v.* Babbitt, supra. It is enough that the claimant should have elected not to assert his security, and that election would be signified by going ahead upon a claim for full dividends."

In *In the Matter of Florence Pruner Young, Bankrupt*, 9 Am. B. R. (N. S.) 544, the Court refused to permit an amendment of an unsecured claim after the receipt of a dividend thereon to show that it was secured, on the ground that the creditor, having pursued the full amount of its claim and having been paid dividends thereon, had elected its remedy.

In *First National Bank* vs. *Exchange National Bank*, 179 App. Div. 22, modified in other respects 226 N. Y. 633, the Appellate Division held that the acceptance of dividends was a waiver of security.

To the same effect:

In re Burr Mfg. & Supply Co., 217 Fed. 16;

In the Matter of Cann, 47 F. (2d) 661;

In re Ballance, et al., 219 Fed. 537;

Ansonia Brass and Copper Co. vs. *Babbitt*, 74 N. Y. 395;

Merchants' Nat. Bank of Syracuse vs. *Comstock*, 55 N. Y. 24;

Elston vs. *Rusch*, 229 N. W. 503 (Mich.);

Hewitt vs. *Hayes*, 91 N. E. 332 (Mass.).

In rejecting the contention that in a Section 77 Reorganization Proceeding a secured creditor might prove in the general estate the full amount of his claim and reserve his security against any deficiency, the Court in *New York Trust Co.* vs. *Palmer*, 101 F. (2d) 1 (C. C. A. 2nd, 1939), speaking through Judge LEARNED HAND, said:

> "* * * The proceeding is in bankruptcy, not in equity, and the uniform practice in bankruptcy has been to deduct the security from the debt. * * * Nor are we impressed with the superior justice of the 'equity' doctrine. It appears to rest upon the notion that insolvency should not disturb a secured creditor's privilege to go first against the debtor, reserving the security for any deficiency. However, a secured creditor knows at the outset that, insofar as his security will not cover him, he must go pari passu with unsecured creditors; and to that extent he accepts the risk of insolvency. As long as the debtor remains solvent, he may exercise his privilege without disclaiming that acceptance; but to allow it in insolvency, is to give him a preference among the very class with whom he had agreed pro tanto to share equally. This is the justification for the 'bankruptcy' doctrine, * * *." (p. 3)

Petitioners at page 19 of their brief cite three cases, none of which supports their position. *Wuerpel* vs. *Commercial Germania Tr., etc.*, 238 Fed. 269 (C. C. A. 5th,

1916) and *Horton* vs. *Queens County Mach. Corp.*, 166 N. Y. S. 662 are clearly distinguishable from the case at bar since the Courts in those cases were concerned with the rights of preferred creditors rather than those of secured creditors. *Moreover,* in the *Horton* case, all the creditors and the trustee concurred in the method of distribution, and entered into a written stipulation permitting the preferred creditor to accept dividends "without prejudice". These elements are not present here. In that case credit was also given for dividends received. The third case cited by petitioners, *In re Grive,* 153 Fed. 597, supports respondents rather than petitioners. In that case the Court specifically held that under the Bankruptcy Act it was necessary for secured creditors either to surrender their liens or have the same valued and credited before they could participate in distributions as general creditors.

In the present case, the Circuit Court pointed out many courses available to the petitioners under which they could have fully protected their claims (R. 66). In criticizing the procedure followed by petitioners, the Circuit Court stated:

> "The parties have demonstrated, as we have indicated, a complete disregard for the pertinent provisions of the Bankruptcy Act. Those provisions were not intended by Congress to apply only to certain individuals or under certain circumstances. Congress intended the provisions of the Act to be of universal application and to establish principles which Congress deemed necessary for the public good. The participants in Stineman's bankruptcy proceedings were bound by the law. National Bank in Johnstown and South Fork Bank may not receive the benefits of their securities and also be treated as general creditors to the full extent of their claims. They may not have the benefit of both positions and the liabilities and obligations of neither. Under the law an attempt to assert an estoppel against Chase or any other creditor which would effect such a result is futile." (R. 67)

POINT II

It is inequitable for a secured creditor to participate in a distribution of dividends based on the full amount of his debt and at the same time retain his security with the advantages as to interest which such a position may entail.

In *Vanston* vs. *Green, et al.*, decided December 9, 1946, this Court said (slip opinion, p. 4):

> "A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. * * *"

After the filing of a petition in bankruptcy there is an inevitable delay in distribution. This is the act of the law and is necessarily brought about in order to protect the estate for the benefit of all interests involved. Such delay, however, should not be the occasion "for anyone to gain an advantage or suffer a loss" (*Vanston* vs. *Green, et al., supra*). The aim is to retain claims of the various classes in the same proportion as they were at the time of the filing of the petition, as if "the whole matter could be settled in a day by a pie-powder court": *Sexton* vs. *Dreyfus*, 219 U. S. 339, 344-345. Advantages to a creditor or class of creditors are consequently not permitted and their recoveries are limited, as provided by the Bankruptcy Act.

If a secured creditor were permitted to accept dividends from the general estate based on the full amount of his claim and still retain his security, he would obtain a greater proportion of the assets than he had at the time of the filing of the petition if the estate diminishes or remains the same. Indeed, since a secured creditor might obtain as much interest on his claim after the filing of the petition as can be satisfied out of the secured property, *Coder* vs. *Arts*, 213 U. S. 223, 245; *Ticonic Bank* vs. *Sprague*, 303 U. S. 406, 414, he would receive a greater proportion of the estate even if the estate increases so long as it does not increase more than the amount of interest paid. This alone

is ample reason why a secured creditor is required to have his security valued and credited before he participates in the general estate. Were the rule otherwise, secured creditors could speculate without incurring risk or obligation and to the possible disadvantage of general creditors. As the Circuit Court said in speaking of the secured creditors, "They may not have the benefit of both positions and the liabilities and obligations of neither" (R. 67).

POINT III

The record discloses no agreement to vary the provisions of the Bankruptcy Act, nor can such an agreement be effective.

The Circuit Court held that even if an agreement of the kind claimed by petitioners had been made it would not be effective to vary the provisions of the statute (R. 67n). This position is in accord with the general policy of the Bankruptcy Act. The "theme" of the statute has been repeatedly stated to be equality of distribution. *Sampsell vs. Imperial Paper and Color Corp.*, 313 U. S. 215, 219.

Petitioners' contention that an agreement was made whereunder they could participate to the full extent of their claims and at the same time retain their entire security is without record support. There is no written instrument to which petitioners can refer, nor does it appear that any vote was ever taken by creditors as to the alleged method of distribution or that any order sanctioning such method was ever entered. In addition, it affirmatively appears that some creditors were absent when Mr. Little made his statement at the meeting of December 31, 1929 (R. 57).

Mr. Little's statement, indefinite as it is, is far from even recommending, much less authorizing, the unusual distribution now asserted to be its outgrowth. He merely stated that a "suggestion" was made as to the disposition of the fund held by the trustee which included income from the sale of realty and income from personalty. It does not

appear that he was suggesting a disposition that would circumvent the provisions of the Bankruptcy Act. On the contrary, the fact that it was suggested that the funds held at the time by the trustee be divided into two items, "one item showing funds arising wholly from real estate * * *; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds," discloses an intention that the judgment lien creditors were to receive the funds arising from real estate against which they asserted their liens and general creditors were to receive the income from personalty. This must follow from the fact that the suggested division resulted after some of the creditors "decided that they could not acquiesce in the suggestion" that the entire fund be paid to the first judgment creditor. There is nothing in Mr. Little's statement as to the lack of necessity for a valuation.

Indeed a possible interpretation of Mr. Little's statement is that a valuation according to the statute was contemplated. The funds arising from the realty would then go to the judgment creditors to liquidate the value as thus established, while the proceeds of the personalty would be divided among the general creditors, including the Johnstown and South Fork banks only to the extent that there was an unsecured balance (as there must necessarily be in the case of the South Fork Bank, since its total claim of $18,463.45 includes only one judgment under which it has asserted a lien—to wit, the judgment for $11,290). However, when both judgment creditors, without valuation or deduction, accepted dividends based upon the full amount of their respective claims, the general creditors were justified in assuming that the judgment creditors decided to waive their security.

No reason appears in the record, nor can it be gathered from Mr. Little's statement, that the general creditors ever intended an indefinite delay in the valuation of petitioners' liens and the possible accumulation of interest over a period of approximately twenty years. Indeed, there would be no reason for general creditors to permit the indefinite

running of a higher rate of interest than generally obtainable with a resultant decrease in the ultimate amount general creditors would receive. The only ones to profit by such a delay are the judgment lien creditors. As this Court has pointed out in *Vanston vs. Green, et al., supra,* the period of delay cannot be the occasion "for anyone to gain an advantage or suffer a loss".

It cannot be assumed that an agreement was made, or even contemplated, which on its face is clearly inequitable and without statutory sanction. Mr. Little's statement is indefinite and no other circumstances are present which establish the alleged agreement. Petitioners may have considered it a better speculation to participate as general creditors rather than rely on their security. In their brief, on page 23, they say:

> "• • • if the lien creditors had foreclosed upon their liens and securities, there would have been little, *if anything,* left for general creditors." (Italics added.)

thus implying that the value of the real estate, upon which they asserted liens, was insufficient to cover the full amount of their claims. Moreover, while it must remain uncertain what doubts may have motivated petitioners, the very fact that they proved and filed their claims implies an expectation that the security would satisfy only part of their debts and that there must be participation in the estate with general creditors for the unsecured balance. (3 Collier on Bankruptcy, § 57.07, p. 157.)

The making of an agreement of the kind here claimed is likewise not supported by the fact that respondent or any other creditor did not question the acceptance of dividends by petitioners until after several were paid. Nor does such failure show laches or create estoppel, as petitioners contend. (Pet. br., p. 20 et seq.) Such a contention overlooks the fact that the unsecured creditors had a right to assume that the Johnstown and South Fork Banks were relying upon the general fund for the payment of their claims. It was not incumbent upon them to determine

what motivated the judgment creditors in pursuing the course they did. Estoppel operates against the one who made the choice and upon which the others had a right to rely. Silence on the part of the unsecured creditors cannot change the fact that an election was made. This election is now final and binding upon the judgment creditors. *In re O'Gara Coal Co.*, 12 F. (2d) 426, cert. den. 271 U. S. 683; *In re Fisk & Robinson*, 185 Fed. 974; *In re Young*, 9 Amer. B. R. (N. S.) 544.

In conclusion it is submitted that even if, under some conditions, creditors might be permitted to agree on a method of distribution which is a departure from that directed by the act, surely this case is not one where such conditions exist. Petitioners would at least have to show (1) that an agreement was actually made and entered into by all parties involved; (2) that it clearly and unequivocally departed from statutory procedure, and (3) that its terms were sufficiently definite to permit enforcement. From the foregoing discussion it appears that all three of these requisites are lacking.

CONCLUSION

The order appealed from should be affirmed in all respects.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 371.—October Term, 1946.

United States National Bank in Johnstown and First National Bank of South Fork, Petitioners, v. Chase National Bank of the City of New York and Lester Larimer, Trustee.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 14, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

A problem arising under the Bankruptcy Act is presented by the unique facts of this case.

On June 10, 1926, Harvey C. Stineman was adjudicated a bankrupt upon a voluntary petition and the case was referred to a referee. The principal asset of the bankrupt estate was an undivided one-sixth interest in a large acreage of valuable coal lands, a large portion of which was operated by lessees and was producing substantial royalties. The value of the interest of the bankrupt estate in this asset is alleged to have been appraised at $90,000.

More than four months prior to the date when the petition was filed and the adjudication made, the United States National Bank of Johnstown, Pa., and the First National Bank of South Fork, Pa., had procured judgments against Stineman. These two judgments constituted first and second liens, respectively, on Stineman's interest in the coal lands. This interest had no other encumbrances upon it.

On January 8, 1927, the Johnstown bank filed its secured claim in the bankruptcy proceedings in the amount of $10,000, reciting as its security the first lien on the interest in the coal lands. This claim was allowed. Subse-

quently, in 1932, the Johnstown bank filed an amended claim in the amount of $13,685, interest accruing after bankruptcy having been added to the original claim. The amended claim was allowed in the amount filed and formed the basis for the bank's participation in the dividends from the general fund, mentioned hereinafter. A court order in 1944 reduced this claim to $10,000.

The South Fork bank, on June 29, 1926, filed its secured claim with the referee for $11,290, reciting the second lien as its security, along with unsecured claims for $7,173.45. Dividends from the general fund were subsequently paid to the bank on the basis of the full amount of all its claims, $18,463.45.

Numerous general, unsecured claims were filed by other creditors, approximating $225,000 in amount. Included among these was the claim of the Chase National Bank of the City of New York, a claim which was allowed in the amount of $55,231.98.

The referee held a meeting of the creditors on December 31, 1929, more than three and a half years after the adjudication. The motive for this meeting appears to have been the fact that the Johnstown and South Fork banks, the judgment lien creditors, were pressing for payment of their secured claims. This meeting was attended by the bankrupt, the trustee in bankruptcy and representatives of the two judgment creditors, the Chase National Bank and certain other general creditors. Apparently not all of the general creditors appeared at this meeting. The consensus of opinion among those present was that the real estate had a value in excess of the liens but that "if the lien creditors foreclosed upon their liens, little, if anything, would be left for general creditors."

One of the attorneys present, P. J. Little, then made a suggestion. Mr. Little at this time was serving as counsel for the trustee, the Chase National Bank and several other general creditors. His suggestion was "that

under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors."

The parties apparently agreed to this proposal. Although no supporting order of the referee appears in the record, the administration of the bankrupt estate proceeded as if a supporting order had been entered. The two judgment lien creditors assented to this course of events and it is asserted that all the creditors understood that the liens were to remain intact until the underlying claims had been paid in full.

Thereafter, four dividends were declared and distributed from the real estate fund, while seven dividends were declared and distributed from the general fund. The Johnstown bank received at least $1,364.76 from the real estate fund; the South Fork bank appears to have received nothing from that fund. Both of these banks shared with the other creditors in the seven distributions from the general fund, the Johnstown bank receiving $2,435.06 and the South Fork bank, $3,285.35. No exceptions were ever taken to any of the various orders of distributions. In addition, these two banks have carefully revived their judgments during each five year period, making the trustee in bankruptcy a party to the proceedings.

In October, 1942, the Chase National Bank filed petitions for a decree to the effect that the two banks had waived their liens by sharing in the distributions from the general fund along with the general creditors and that the Johnstown bank should be compelled to return the $1,364.76 it had received from the real estate fund. The referee, however, held that both the Johnstown and South

Fork banks were entitled to maintain their positions as lien creditors and at the same time participate in the distributions from the general fund. The District Court reversed the referee's decision, feeling that participation in distributions from both the real estate and general funds was contrary to accepted bankruptcy practice. *In re Stineman*, 56 F. Supp. 190. On rehearing, the District Court changed its mind; it became convinced that the Chase National Bank had recommended the arrangement, had acquiesced in its execution and was now estopped from objecting. *In re Stineman*, 61 F. Supp. 151. The Third Circuit Court of Appeals reversed, holding that the parties had completely disregarded the pertinent provisions of the Bankruptcy Act and that the Johnstown and South Fork banks had waived their liens and were entitled to share in the bankruptcy estate only as general creditors. *In re Stineman*, 155 F. 2d 755.

Sections 65 (a) and 57 (h) of the Bankruptcy Act are the ones pertinent to this case. Section 65 (a) provides: "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." 11 U. S. C. § 105 (a). Section 57 (h) provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court." 11 U. S. C. § 93 (h).

Under these provisions, there are several avenues of action open to a secured creditor of a bankrupt. See 3 Collier on Bankruptcy (14th ed.) pp. 149–157, 255–259. (1) He may disregard the bankruptcy proceeding, decline

to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.*, 94 F. 2d 536; *Ward* v. *First Nat. Bank*, 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.*, 179 F. 929; *Morrison* v. *Rieman*, 249 F. 97. (4) He may avail himself of his security and share in the general assets as to the unsecured balance. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131; *Ex parte City Bank*, 3 How. 292, 315.

Section 57 (h) is a codification of this fourth possibility. It permits the secured creditor to receive dividends along with the general creditors only on the balance remaining after the value of the security has been determined and deducted from the claim. This rule, commonly known as the bankruptcy rule, is designed to preclude any unwarranted advantage from accruing to the secured creditor. Grounded upon the statutory principle of equality and ratable distribution, it prohibits the secured creditor from reaping the whole benefit of his security while simultaneously taking dividends from the general assets on the basis of his entire claim as if he had no security. This rule differs from the one in equity, which allows the secured creditor to receive dividends on the full amount of his claim, crediting all dividends received and reserving the security against any deficiency. *Merrill* v. *National Bank of Jacksonville, supra.* And see 3 Collier on Bankruptcy (14th ed.) p. 153; Hanson, "The Secured Creditor's Share of an Insolvent's Estate," 34 Mich. L. Rev. 309; 12 Ford. L. Rev. 77.

It is argued that the plan adopted in this case cannot be sanctioned under the foregoing principles. This plan allegedly called for the use of something similar to the equity rule of distribution. The judgment lien creditors were to retain their liens while sharing fully in the dividends from the general funds as if they had no liens, crediting the dividends received against their claims. But § 57 (h) is said plainly to outlaw the use of that rule; if the judgment lien creditors wished to retain their liens, they could share in the dividends only to the extent that their claims exceeded the value of their liens. Since they did not follow the provisions of § 57 (h), the conclusion is reached that they have waived their liens and must now be considered solely as unsecured creditors.

At this point it should be noted that the incomplete record before us fails to reveal the value of the interest in the coal lands to which the liens attached. The judgment lien creditors claim that the value was fixed at $90,000, but no such valuation appears in the record. That it might be less than $90,000 is indicated by the statement of these creditors that if they had foreclosed on their combined liens of $21,290, "there would have been little, if anything, left for the general creditors." But in the setting of this case, we believe it immaterial whether the value of the interest in the coal lands was greater or less than the amount of the secured claims. In either event, the problem before us concerns itself with the present validity of the liens. Has the conduct of the judgment lien creditors been such as to constitute a waiver of their judgment liens? That question we answer in the negative.

The fact that the judgment lien creditors received general dividends contrary to the scheme of § 57 (h) does not necessarily mean that they thereby waived their liens. Nothing in the language of § 57 (h) or of any other section of the Act makes such a receipt the necessary equivalent of a waiver. It is generally true that participation by a

secured creditor in distributions from the general assets on the basis of his full claim indicates a waiver of the security and an election to be treated as an unsecured creditor. See *In re O'Gara Coal Co.*, 12 F. 2d 426. But that is not an invariable result flowing from the application of any rigid statutory rule. The result depends, rather, upon the circumstances surrounding the receipt of the dividends. And in exceptional cases, those circumstances may demonstrate the continued vitality of the security as well as indicate that it would be inequitable to declare the security forfeited. See *Wuerpel* v. *Commercial Germania Trust & Savings Bank*, 238 F. 269; *Maxwell* v. *McDaniels*, 195 F. 426; *Hartford Accident & Indemnity Co.* v. *Coggin*, 78 F. 2d 471; *Standard Oil Co.* v. *Hawkins*, 74 F. 395.

In the rare case where there is reasonable doubt as to whether a waiver has occurred, a careful examination must therefore be made to determine the conditions under which the dividends from the general assets were distributed to the secured creditor. And that examination must be made in the light of the recognized principles of equity. It has long been established that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240; *Pepper* v. *Litton*, 308 U. S. 295, 304. In determining whether a waiver of liens has taken place, the bankruptcy court must accordingly look to the equities involved as well as to the intention of the parties. A waiver may be inequitable or unfair to the secured creditor; the receipt of dividends may not have caused permanent injury to the unsecured creditors; the dividends may have been received under a mistake of law or fact or pursuant to court approval; the objecting party may be estopped from questioning the validity of the liens. Such equitable considerations may well be decisive of a waiver or forfeiture in a particular case.

It is at once evident in this case that the judgment lien creditors received dividends from the general fund in good

faith and without any intent to waive their liens. The principal asset of the estate was the interest in the coal lands and it was that interest to which the liens attached. Representatives of various general creditors believed that it would be to their advantage to have this interest remain intact, without being liquidated in whole or in part in order to satisfy the liens. Their thought was that by maintaining undiminished the royalties and rentals from this interest the unsecured claims could more rapidly be satisfied. To that end it was proposed that the judgment lien creditors refrain from immediate liquidation of their claims and share in the dividends from the general fund, a fund which included the royalties and rentals from the interest in the coal lands. The judgment lien creditors accepted this proposal, being willing to postpone any immediate realization of their security. But they did so with the distinct understanding that their liens were not forfeited and they took pains to renew the underlying judgments every succeeding five years in order to keep the liens alive. There is thus absent any element of an intentional waiver of the liens or any action inconsistent with a desire to retain the liens in the circumstances surrounding the receipt of the dividends by the judgment lien creditors. Cf. *Thomas* v. *Taggart*, 209 U. S. 385; *In re Kaplan & Myers*, 241 F. 459.

Nor do we perceive any equitable reason why these liens should be declared forfeited. The incomplete record in this case does not indicate whether the referee or the bankruptcy court ever gave formal approval to the agreement under which the judgment lien creditors received dividends along with the unsecured creditors. But the bankruptcy proceedings went forward for more than twelve years as if such approval had been given, authorization being given for the distribution of numerous dividends pursuant to the plan. Certainly the agreement had the implied, if not the express, blessing of the referee and the bankruptcy court.

Hence the judgment lien creditors cannot be accused of having participated in a plan which was unknown to, or disapproved by, those responsible for the proper administration of the proceedings. A forfeiture of the liens would only penalize unfairly the judgment lien creditors, who joined the plan in good faith and without any apparent intention of harming others or of securing any undue advantage for themselves.

It is further significant that the plan was proposed by an attorney for Chase National Bank, the general creditor now objecting. Apparently not all the general creditors were present or represented at the meeting on December 31, 1929, when the proposal was made and accepted. But the agreement, with its various dividend distributions taking place between 1935 and 1942, must have come to the attention of all the general creditors sooner or later; yet none of them raised any objection to the various distributions or to the agreement during this long period of time. No reason suggests itself why any of these general creditors should now be permitted to question the dividends received in the past by the judgment lien creditors or to demand that the liens be declared forfeited because of the receipt of such dividends. Especially is this so as to Chase National Bank. As the District Court noted, 61 F. Supp. at 152, its counsel recommended and had full knowledge of the agreement; and Chase had knowledge of the subsequent dividend distributions, to which it did not demur. At this late stage, it is equitably estopped from raising any objection to the validity of the liens on the basis of the operation of the plan which it proposed. Cf. *Merchants Bank* v. *Sexton*, 228 U. S. 634; *In re National Public Service Corporation*, 68 F. 2d 859; *In re American S. S. Nav. Co.*, 14 F. Supp. 106.

Moreover, the record does not indicate that any permanent injury to Chase National Bank or to the other general creditors resulted from the operation of the plan. The whole scheme was adopted with the idea that they would

be benefited and we cannot say that this purpose has failed of achievement. Having proposed and acquiesced in the plan, the Chase National Bank cannot now be heard to complain of any resulting injury, especially an injury that is not apparent in the record.

We conclude from these various considerations that the liens should be held to be valid and in existence despite the failure to follow the provisions of § 57 (h) and despite the distribution of dividends contrary to § 65 (a). There was never any intention to waive the security and those who might have objected to the distributions are now estopped. But in view of the fact that the bankruptcy proceedings have been unduly prolonged for over twenty years, the bankruptcy court should now take steps to wind up the estate in accordance with the provisions of the Bankruptcy Act. Those provisions are designed to bring about the speedy distribution of the bankrupt's assets, a distribution of the type which definitely has not occurred in this case.

The judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER is of opinion that the order of the District Court should be restored on the ground that the creditors entered into an agreement which was not objectionable under § 57 (h) of the Bankruptcy Act, whereby the liens of the petitioners were saved.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS dissents.